DOCKET

No. 88-1083-CFX
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Title: John Doe Agency and John Doe Government Agency, Petitioners
v.
John Doe Corporation

Docketed:
December 29, 1988

Court: United States Court of Appeals for the Second Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Eisenberg,Milton

Entry	Date	Note	Proceedings and Orders
1	Dec 29 1988	G	Petition for writ of certiorari filed.
2	Jan 10 1989	G	Application (A88-552) to recall and stay pending the disposition of a petition for a writ of certiorari, submitted to Justice Marshall.
3	Jan 10 1989		Application (A88-552) granted by Justice Marshall pending receipt of a response due January 17, 1989, and further order.
4	Jan 17 1989		Response to application (A88-552) filed by John Doe Corporation.
5	Jan 18 1989		(A88-552) Reply Memorandum for the Applicants filed.
8	Jan 27 1989		Brief of respondent John Doe Corp. in opposition filed.
7	Jan 30 1989		Application (A88-552) granted by Justice Marshall pending disposition of the petition for writ of certiorari. Opinion issued.
9	Feb 1 1989		DISTRIBUTED. February 17, 1989
10	Feb 10 1989		Lodging received. (10 copies).
11	Feb 10 1989	X	Reply brief of petitioners John Doe Agency, et al. filed.
12	Feb 21 1989		Petition GRANTED. **********
13	Feb 28 1989		Record filed.
		*	Certified original record and C. A. Proceedings received.
14	Feb 28 1989	D	Motion of respondent to advance oral argument filed.
15	Mar 1 1989		Opposition of petitioners to motion of respondent to advance filed.
17	Mar 1 1989		DISTRIBUTED. March 3, 1989. (Motion of respondent to advance oral argument).
16	Mar 6 1989		Motion of respondent to advance oral argument DENIED.
18	Mar 30 1989		Lodging received. (10 copies - under seal).
19	Apr 7 1989		Brief of petitioners John Doe Agency, et al. filed.
20	Apr 7 1989		Joint appendix filed.
21	May 5 1989		Brief of respondent John Doe Corporation filed.
22	May 8 1989		Brief amici curiae of Public Citizen, et al. filed.
23	May 27 1989	G	Application (A88-950) to extend the time to file a reply brief from June 4, 1989 to June 19, 1989, submitted to Justice Marshall.
24	May 31 1989		Application (A88-950) granted by Justice Marshall extending the time to file until June 19, 1989.
25	Jun 19 1989		Reply brief of petitioners John Doe Agency, et al. filed.
26	Jul 20 1989		SCHEDULED FOR ARGUMENT MONDAY, OCTOBER 2, 1989. (1ST CASE)

No. 88-1083-CFX

Entry	Date	Note	Proceedings and Orders
27	Jul 27 1989		CIRCULATED.
28	Sep 19 1989	X	Supplemental brief of respondent John Doe Corporation filed.
29	Oct 2 1989		ARGUED.

PETITION FOR WRIT OF CERTIORARI

88-1083

No.

FILED
DEC 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

JOHN DOE AGENCY AND JOHN DOE GOVERNMENT AGENCY,
PETITIONERS

v.

JOHN DOE CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether materials gathered for law enforcement purposes, but not originally obtained or created for law enforcement purposes, are "compiled for law enforcement purposes" within the meaning of Exemption 7 of the Freedom of Information Act, 5 U.S.C. (& Supp. IV) 552(b)(7).

II

PARTIES TO THE PROCEEDING

Petitioners, defendants below, are John Doe Agency and John Doe Government Agency, pseudonyms for federal agencies whose real identities are stated in materials that were filed under seal in the court of appeals. Respondent, plaintiff below, is John Doe Corporation, a pseudonym for a private corporation whose real identity is stated in materials that were filed under seal in the court of appeals.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No.

JOHN DOE AGENCY AND JOHN DOE GOVERNMENT AGENCY, PETITIONERS

v.

JOHN DOE CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of John Doe Agency and John Doe Government Agency,[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-11a) is reported at 850 F.2d 105. The opinion of the district court (App., *infra,* 12a-14a) is unreported.[2]

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[1] The papers in this case were sealed by order of the court of appeals. In its public opinion, the court of appeals refers to the defendants, which are entities of the federal government, as John Doe Agency and John Doe Government Agency. We continue those designations in this petition.

[2] Identifying information in the district court's opinion has been omitted in printing the appendix to this petition.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 15a-16a) was entered on June 23, 1988. A petition for rehearing was denied on November 8, 1988 (App., *infra*, 17a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Freedom of Information Act, 5 U.S.C. (& Supp. IV) 552, provides in pertinent part:

> (a) Each agency shall make available to the public information as follows:
>
> * * * * *
>
> (3) * * * each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.
>
> * * * * *
>
> (b) This section does not apply to matters that are—
>
> * * * * *
>
> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual * * *.

STATEMENT

In this case, the court of appeals rejected the government's justification for withholding information pursuant to Exemption 7 of the Freedom of Information Act (FOIA), 5 U.S.C. (& Supp. IV) 552(b)(7), and remanded the case to the district court.[3] The court held that the records at issue could not be withheld under Exemption 7 because, *whether or not their release would interfere with law enforcement proceedings*, they were not "compiled for law enforcement purposes."

The decision of the court of appeals would seriously impair the ability of numerous federal agencies to conduct

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[3] Exemption 7 exempts from mandatory disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information" gives rise to one or more of six specified harms. 5 U.S.C. (& Supp. IV) 552(b)(7). In the present case, the district court determined that disclosure of the requested records, or even an index of those records, "could reasonably be expected to interfere with enforcement proceedings" (5 U.S.C. (Supp. IV) 552(b)(7)(A)).

their law enforcement responsibilities. Many agencies collect through routine monitoring functions information that later becomes an essential part of a criminal (or other law enforcement) investigation. The panel's ruling would require federal agencies to segregate and disclose all such records or information even though they are an integral part of a legitimate criminal (or other law enforcement) investigation. Such disclosure would be very harmful to law enforcement proceedings at the investigative stage.

1. In 1978, John Doe Agency exchanged letters with John Doe Corporation (Corporation or respondent) concerning the allocation of certain costs incurred by Corporation under its contracts (see App., *infra*, 2a). In a letter dated May 2, 1978, John Doe Agency asserted that those costs were wrongly charged to a technical overhead account when they should have been charged directly to certain government contracts (*ibid.*). Corporation responded on July 11, 1978, defending its allocation (*ibid.*).

The issue was revived eight years later, in 1986, during a grand jury investigation of possible fraudulent practices by Corporation (see App., *infra*, 2a). That investigation was opened on July 18, 1985, with Corporation named as a subject. The grand jury issued its first subpoena to Corporation on February 21, 1986. Corporation made a FOIA request on September 30, 1986, to John Doe Agency for "all documents, [etc.] that are related in any way to the subject matter of the [1978] correspondence between [John Doe Agency] and [Corporation]" (C.A. App. 1).[4] John Doe Agency denied the request on November 18, 1986, "[u]pon the advice and direction" of an Assistant United States Attorney (*id.* at 25). On November 20, 1986, the requested records were transferred from John Doe

[4] The joint appendix in the court of appeals was filed under seal.

Agency to John Doe Government Agency, a federal law enforcement agency.

On February 3, 1987, Corporation made a FOIA request to John Doe Government Agency for "all documents that are related in any way to the subject matter of the [1978] correspondence between [John Doe Agency] and [Corporation]" (C.A. App. 38). John Doe Government Agency denied the request, relying on Exemption 7 (*id.* at 40). Corporation filed an administrative appeal (*id.* at 41). When its appeal was not ruled on within the prescribed time, Corporation filed suit in the United States District Court for the Eastern District of New York (*id.* at 9, 11).

2. In the district court proceedings, the government opposed disclosure on the basis that the documents are exempt under Exemptions 7(A) and 7(E) (see C.A. App. 106). The court ordered the government "to prepare a *Vaughn* index and to answer plaintiff's interrogatories and to submit these documents to the court for an *in camera* examination" (*id.* at 109-110).[5] After conducting the in camera examination, the district court held that the defendants could not be required to turn any of the documents over to Corporation because "there is a substantial risk that disclosure of any of this material, the documents, the *Vaughn* index and the answers to [John Doe Corporation's] interrogatories, would jeopardize the grand jury proceeding" (App., *infra*, 14a).

3. On June 23, 1988, the court of appeals ruled that Exemption 7 did not protect the documents from disclosure because they were not "compiled for law enforcement purposes" (App., *infra*, 7a-8a)—a phrase the court

[5] The *Vaughn* index (see *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974)) describes the documents that are being withheld by the government pursuant to Exemption 7.

construed to mean *originally obtained or generated* for law enforcement purposes. The court's entire analysis of this important issue was as follows (*ibid.*):

> The district court held that the documents were exempt under FOIA Subsection (b)(7), which exempts from disclosure "matters that are . . . records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information[] could reasonably be expected to interfere with enforcement proceedings." Although the district court concluded that disclosure would "jeopardize" the grand jury proceedings, it made no finding as to whether the records sought were "compiled for law enforcement purposes." Such a finding is essential to a valid claim of exemption under Subsection (b)(7). * * *
>
> In the instant case, the documents requested were generated by Agency independent of any investigation in the course of its routine monitoring of Corporation's accounting procedures with regard to Corporation's defense contracts. The records were compiled in 1978, seven years before the investigation began in 1985. They were thus not "compiled for law enforcement purposes" and are not exempted by Subsection (b)(7).
>
> The 1974 amendments to the FOIA make it clear that a governmental entity cannot withhold materials under the FOIA on the ground that materials that were not investigatory records when compiled have since acquired investigative significance. Originally, the FOIA exemption in question applied to "investigatory files." In 1974, however, Congress substituted the word "records" for "files" to insure that documents produced in the routine course of government operations would not be withheld under Subsection (b)(7) merely because they have been commingled with investigative materials generated later in the course of a law enforcement proceeding. [*NLRB* v.] *Robbins Tire & Rubber [Co.],* 437 U.S. [214,] 227-30 [(1978)]; *see also* [*FBI* v.] *Abramson,* 456 U.S. [615,] 626-27 [(1982)]. The attempt in the instant case to withhold documents generated in the course of routine audits because they are now part of an investigatory file thus contravenes the obvious intent of the 1974 amendments to FOIA. *See Hatcher* [v. *United States Postal Service*], 556 F.Supp. [331,] 335 [(D.D.C. 1982)].
>
> We realize that compliance with the FOIA may compel the government to disclose matters that are ordinarily beyond the scope of discovery in criminal investigations and thus may enable a potential defendant to prepare responses to the investigation and to construct a defense to criminal charges. That is a concern that should be addressed to Congress, however.

4. The government filed a petition for rehearing and suggestion of rehearing en banc, which the court of appeals denied on November 8, 1988 (App., *infra,* 17a). The government then filed a motion for a stay of the issuance of the mandate, and the court of appeals denied that motion on November 28, 1988 (see *id.* at 16a).

5. On December 12, 1988, the district court held that the decision of the court of appeals required that the government turn over the *Vaughn* index to Corporation. The district court stayed its order requiring disclosure until December 16, 1988, so that the government could seek a stay from the Second Circuit. The government filed a notice of appeal from the district court's order on December 13, 1988, and filed a motion for a stay in the Second Circuit on December 16, 1988.[6]

[6] The appeal from the district court's disclosure order is predicated on our belief that the June 1988 decision of the court of appeals (App.,

REASONS FOR GRANTING THE PETITION

Even apart from its precedential effect, the decision of the court of appeals is likely to interfere with an important law enforcement investigation.[7] More important, the decision sets a precedent that, if followed (as it must be within one very important jurisdiction, the Second Circuit), would—virtually by definition—result in serious problems for law enforcement, because the decision reads out of the statute the exemption for records or information whose disclosure "could reasonably be expected to interfere with enforcement proceedings," except in those cases in which an agency can demonstrate that every item in its files *originated* as a law enforcement document. The premature criminal discovery sanctioned by the court below would systematically provide the targets of grand jury (or other) investigations with valuable clues concerning the grand jury's (or agency's) strategy and the direction of its in-

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infra, 1a-11a), on which the district court's order is based, is incorrect. If our appeal becomes moot because the Second Circuit and this Court both deny further stays of the district court's order and the *Vaughn* index is released, or if this Court does not ultimately overturn the Second Circuit's June 1988 decision, we will dismiss the appeal from the district court's order of December 12, 1988.

As of the date of filing of this petition, the government's stay motion remains pending in the Second Circuit, and the district court's stay of its own disclosure order remains in effect until the Second Circuit rules. If the Second Circuit denies a stay, we plan to seek a stay and recall of the Second Circuit's mandate issued November 28, 1988, in this case (App., *infra*, 16a), and a concomitant stay of the district court's December 12 disclosure order, in this Court.

[7] The district court so determined, and the court of appeals did not disagree. Instead, the court of appeals regarded that consideration as irrelevant to the proper disposition of this case. The nature of the harm to law enforcement interests that can be expected if the documents at issue are released is spelled out in affidavits that were filed under seal in the district court.

quiry; apprise such targets, by negative inference, of types or classes of documents that may not yet have been reviewed by the grand jury (or agency), thereby creating the potential for such documents to be placed permanently beyond the grand jury's (or agency's) reach and hindering its investigation; and create the potential for the target of the investigation to "tailor its responses to Government's inquiries so as to provide the least possible relevant information * * * [thereby tending] to frustrate the [grand jury's or agency's] proceedings." *Fedders Corp.* v. *FTC*, 494 F. Supp. 325, 329 (S.D.N.Y.), aff'd mem., 646 F.2d 560 (2d Cir. 1980).

As we show below, the decision of the court of appeals is also plainly wrong. Although the decision below does not squarely conflict with any decision of another court of appeals, we submit that its practical impact and manifest incorrectness are such that review by this Court is clearly warranted.[8]

1. The statute does not use the phrase "originally compiled," nor does the word "compiled" itself connote a distinction between the original act of obtaining information and the act of gathering it from other sources—inside or outside the government.[9] To the contrary,

> The introduction of such a narrowing term ["originally"] would undercut Congress' deliberate selection of

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[8] The decision of the court of appeals does conflict with the recent decision in *Gould Inc.* v. *GSA*, 688 F. Supp. 689 (D.D.C. 1988), in which Judge Sporkin analyzed the issue carefully and at length, and reached the opposite conclusion from that reached by the court of appeals. See also *Fedders Corp.* v. *FTC*, *supra*. But see *Hatcher* v. *United States Postal Service*, 556 F. Supp. 331, 335 (D.D.C. 1982); *Goldschmidt* v. *United States Dep't of Agriculture*, 557 F. Supp. 274, 276 (D.D.C. 1983).

[9] Under the analysis of the court of appeals, a federal law enforcement agency such as John Doe Government Agency "compiles"

the word "compiled" for usage in the statute. According to Webster's Ninth Collegiate Dictionary, the word "compile" means:

> to collect and edit into a volume; to compose out of materials from other documents; to run (as a program) through a compiler; to build up gradually . . .

(1985). A compilation of information or materials "compiled" for law enforcement purposes therefore can be "composed out of materials from other documents"—including other documents already generated or collected by the government for non-law enforcement purposes. Therefore, materials originally drafted, generated, or even compiled for one purpose—even if that purpose is benign—subsequently can be "compiled for law enforcement purposes."

Gould Inc. v. *GSA*, 688 F. Supp. 689, 697-698 (D.D.C. 1988).

The opinion of the court of appeals in the present case does not accord the word "compiled" its plain meaning or even acknowledge that the word, in ordinary usage, refers to an act that can be performed many times on the same documents or information.[10] For example, the court

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auditing records for law enforcement purposes when it gets them from, for example, Price Waterhouse or Arthur Andersen, but not when it gets them from another government agency, such as John Doe Agency. Such a rule hardly comports with the plain meaning of the word "compile."

[10] This Court, by contrast, has specifically recognized—in interpreting Exemption 7—that documents can be "compiled" more than once. See *FBI* v. *Abramson*, 456 U.S. 615, 622 n.5 (1982) (rejecting argument "that information admittedly compiled in a law enforcement record loses its exemption when recompiled").

stated (App., *infra*, 7a) that the fact that "[t]he records were compiled in 1978" proved, without more, that they were "not 'compiled for law enforcement purposes' "—a theory analogous to saying, for example, that opinions of this Court collected in a constitutional law casebook could not have been compiled for the purpose of teaching a course in constitutional law because they were not originally generated for that purpose. Likewise, the court referred to the records in this case (*id.* at 7a-8a) as "materials that were not investigatory records when compiled [but] have since acquired investigative significance." Yet the materials most assuredly did have investigative significance when compiled by John Doe Government Agency. Only by giving the word "compiled" something other than its ordinary meaning could the court of appeals reach the conclusion it did. Cf. *Beech Aircraft Corp.* v. *Rainey*, No. 87-981 (Dec. 12, 1988), slip op. 9-10 (criticizing lower court's interpretation of a rule of evidence because that interpretation unjustifiably departed from the precise words used in the rule and their dictionary definition).

2. The court of appeals also relied on the legislative history of the 1974 amendments to FOIA to support its reasoning. Even if we assume that the court of appeals was correct in looking to the legislative history at all, despite the plain language of the statute supporting the government's position, the court seriously misinterpreted the legislative record.

In *Ditlow* v. *Brinegar*, 494 F.2d 1073 (D.C. Cir. 1974), the court held that *everything* found in an investigatory file compiled for law enforcement purposes was automatically exempt from mandatory disclosure under the then-current version of Exemption 7, 5 U.S.C. (1970 ed.) 552(b)(7). Fearing that agencies would use that rule to

commingle otherwise nonexempt material with exempt material in law enforcement files, Congress amended the statute in 1974 to overrule *Ditlow* (and three other D.C. Circuit decisions). See generally *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 227-230 (1978) (surveying legislative history). Congress did not, however, change in any way the statutory phrase "compiled for law enforcement purposes." Rather, it changed the description of the exempted material from "investigatory *files* compiled for law enforcement purposes" (5 U.S.C. (1970 ed.) 552(b)(7) (emphasis added)) to "investigatory *records* compiled for law enforcement purposes" (5 U.S.C. (1982 ed.) 552(b)(7) (emphasis added)).[11] In addition, Congress changed the status of having been "compiled for law enforcement purposes" from a *sufficient* condition for withholding to a *necessary* condition, adding the further requirement that the records meet one of six specific criteria.

The clear thrust of the 1974 amendments is to make an agency and a court look at each individual record and determine whether withholding that record is justified by one of six specific policies. In that way, unwarranted withholding by "commingling" is prevented. The court of appeals devised a completely dissimilar way to prevent withholding by "commingling," *i.e.*, to construe the word "compiled" to mean "originally compiled." Yet the legislative history shows very plainly that Congress had another method altogether in mind for achieving its desired—and quite different—result. Congress wanted to

[11] The statute has since been further amended, in an effort to *expand* its reach, to cover "records *or information* compiled for law enforcement purposes," without any requirement that the records or information be "investigatory" (5 U.S.C. (Supp. IV) 552(b)(7) (emphasis added)). See generally *Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act* 5-9 (1987) (summarizing change to Exemption 7 threshold test, its legislative history, and its proper interpretation).

do away with broad categorical determinations and substitute record-specific examination, yet the court of appeals has interpreted Congress's action as a mandate to engage in broad categorical determinations and to release records that fit precisely within the categories that Congress fashioned. That is a serious error.[12] See generally *Gould*, 688 F. Supp. at 702.

3. The court of appeals essentially acknowledged that its opinion leads to an anomalous result, but the court suggested that it was only following the dictates of the statute (App., *infra*, 8a):

> We realize that compliance with the FOIA [as interpreted by the court of appeals] may compel the government to disclose matters that are ordinarily beyond the scope of discovery in criminal investigations and thus may enable a potential defendant to prepare responses to the investigation and to construct a defense to criminal charges. That is a concern that should be addressed to Congress, however.

That reasoning, which would be unassailable if the court had indeed reached a result compelled by the statute's

[12] In essence, the court of appeals has concluded that reading "compiled" to mean "originally compiled" will serve Congress's objective of preventing withholding by commingling and therefore must be the proper interpretation of the statute. "But no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987). Here, Congress did not merely prohibit exemption by commingling; it also indicated the criteria by which records qualifying for the exemption are to be differentiated from the commingled records that do not qualify—criteria that differ substantially from the broad-brush approach of the court of appeals.

plain language or shown by the legislative history to be Congress's clear intention, rings hollow in light of the court's departure from the plain language of the statute and its adoption of an approach that is not supported by the legislative history. Cf. *FBI* v. *Abramson*, 456 U.S. 615, 625 n.7 (1982).

Moreover, the court's reasoning markedly departs from the approach that this Court took in *FBI* v. *Abramson, supra.* The issue in that case—closely related to the issue here—was whether information originally compiled for law enforcement purposes and meeting the other criteria of Exemption 7 lost its exempt status when it was recompiled for non-law-enforcement purposes. In answering that question in the negative, the Court reasoned that the statutory language and legislative history were ambiguous and that therefore the Court would answer the question presented by reference to "the intention of Congress, * * * the structure of the Act, and * * * the purposes of the statute" (456 U.S. at 625 (footnote omitted)). Significantly, in assessing those guides to Congress's intent, the Court specifically ruled that "[t]he enumeration of [six] categories of undesirable consequences [in Exemption 7] indicates that Congress believed the harm of disclosing this type of information would outweigh its benefits" (*id.* at 627-628). The Court found "nothing to suggest, and no reason for believing, that Congress would have preferred a different outcome simply because the information is now reproduced in a non-law-enforcement record" (*id.* at 628).

The rationale of *Abramson* indicates that "compiled for law enforcement purposes" is not to be construed as a high, or highly technical, barrier to claims of exemption. Rather, in light of the 1974 amendments, the emphasis should be placed on the six criteria that Congress specified as prerequisites to withholding. The requirement that records or information be "compiled for law enforcement

purposes" is not meaningless, but neither is it to be construed in a restrictive or non-functional way. To the extent that there is ambiguity in that statutory requirement as applied to a particular case, *Abramson* teaches that it should be resolved in favor of deeming a particular record to be a law enforcement record and disclosing it or not disclosing it depending on the application of subsections (A)-(F) of Exemption 7.

Congress has recently expressed approval of the practical approach adopted by this Court in *Abramson*. See S. Rep. 98-221, 98th Cong., 1st Sess. 23 (1983) (containing pertinent discussion and citing *Abramson* twice with apparent approval).[13] Exemption 7, as amended in 1986, applies to "records *or information* compiled for law enforcement purposes." The amendment plainly is designed "to ensure that sensitive law enforcement information is protected under Exemption 7 *regardless of the particular format or record in which it is maintained.*" *Ibid.* (emphasis added). Congress's most recent view of how Exemption 7 is to be applied is thus very much at odds with the hypertechnical approach of the court of appeals in this case.[14]

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[13] This report, which concerned a predecessor bill to what eventually became the 1986 amendments to Exemption 7, is recognized as authoritative concerning the meaning of those amendments. See *King* v. *Department of Justice*, 830 F.2d 210, 229 n.141 (D.C. Cir. 1987); 132 Cong. Rec. S14296 (daily ed. Sept. 30, 1986) (statement of Sen. Leahy) (Senate Report 98-221 "sets out the legislative history which should be considered to determine the scope of the section we are adopting in this bill").

[14] The 1986 amendments, which apply fully to this case, were "intended to broaden the reach of this exemption and to ease considerably a Federal law enforcement agency's burden in invoking it." *Irons* v. *FBI*, 811 F.2d 681, 687 (1st Cir. 1987) (quoting 132 Cong. Rec. S16504 (daily ed. Oct. 15, 1986) (statement of Sen. Hatch)). See

The court's decision is also at odds with earlier pronouncements of this Court concerning the purposes of Exemption 7. In *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. at 224-225 (citations omitted), this Court summarized those purposes:

> In originally enacting Exemption 7, Congress recognized that law enforcement agencies had legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations or placed at a disadvantage when it came time to present their cases. Foremost among the purposes of this Exemption was to prevent "harm [to] the Government's case in court" * * * by not allowing litigants "earlier or greater access" to agency investigatory files than they would otherwise have * * *.

See also *Alyeska Pipeline Service Co.* v. *EPA*, 856 F.2d 309, 313 (D.C. Cir. 1988). Such "earlier or greater access" is precisely what the court of appeals has given respondent in this case—as the court acknowledged (App., *infra*, 8a).

4. Even if there were more substantial grounds to support the decision of the court of appeals, the issue presented is of such importance that it would merit this Court's review. If the decision of the court of appeals stands, it will seriously impair the ability of numerous federal agencies to conduct their law enforcement responsibilities. Many agencies—such as those involved with defense or other government contracts, the Drug Enforcement Administration, and the Internal Revenue Service—collect through routine monitoring functions information

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also, *e.g.*, *Arenberg* v. *DEA*, 849 F.2d 579, 581 (11th Cir. 1988) ("It is quite clear * * * that Congress did not intend to jeopardize law enforcement activities by the Freedom of Information Act.").

that later becomes an essential part of a criminal (or other) law enforcement investigation.[15]

The ruling of the court of appeals would require federal agencies to segregate and disclose all such records or information even though those records or information were, at the time of the FOIA request, an integral part of a legitimate, ongoing criminal (or other law enforcement) investigation.[16] Such disclosure would prematurely alert potential defendants to the existence of an investigation, identify strengths and weaknesses of the government's case, and disclose the specific focus of a grand jury (or other) investigation. That is precisely why Congress has refrained from authorizing premature criminal discovery

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[15] The federal agencies that have expressed to us their concerns about the harmful impact that the decision below could have on their ability to enforce the law include the Consumer Product Safety Commission, the Defense Contract Audit Agency, the Department of Commerce, the Department of Education, the Department of Labor, the Department of the Navy, the Department of State, the Department of the Treasury (on behalf of the Bureau of Alcohol, Tobacco, and Firearms, the Customs Service, and the Office of Foreign Assets Control), the Federal Bureau of Investigation, the Federal Trade Commission, the Internal Revenue Service, the Postal Service, the Small Business Administration, and the Antitrust, Civil, and Criminal Divisions of the Department of Justice.

[16] Although the records at issue in this case all came to the agency that now has them from a single other government agency, that will not necessarily be true in future cases in which targets of law enforcement requests seek premature criminal discovery under the decision below. The decision of the court of appeals presumably would require the law enforcement agency to sift through its files, which may come from many sources, and determine the original source of *each* record in order to determine whether it was "compiled" (in the sense in which the court of appeals used that word) originally for law enforcement purposes. That task—which serves no policy goal that Congress could conceivably have had in mind—could take on extremely burdensome proportions.

in any other context, and we submit it has not done so here.[17]

Before the Freedom of Information Act is to be construed to make so serious an inroad on effective law enforcement—in the major investigation underlying this case and in many others as well—this Court's attention is appropriate and necessary.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1988

[17] In addition, although this case directly concerns Exemption 7(A), the panel's ruling construes the threshold requirement to all of Exemption 7, and thus would presumably prevent the government from invoking the protections provided by the other subsections of Exemption 7, including the protection of confidential informants, the privacy of innocent individuals named in law enforcement records, and the protection of the lives or physical safety of law enforcement officers or others identified in such records. See 5 U.S.C. (Supp. IV) 552(b)(7)(B)-(F).

APPENDIX A

UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

No. 1238, Docket 88-6098

JOHN DOE CORPORATION, PLAINTIFF-APPELLANT

v.

JOHN DOE AGENCY AND
JOHN DOE GOVERNMENT AGENCY, DEFENDANTS-APPELLEES

Argued May 18, 1988
Decided June 23, 1988

Before LUMBARD, MESKILL and WINTER, Circuit Judges.

WINTER, Circuit Judge:

This expedited appeal, based on sealed papers, concerns the scope of certain exemptions to the Freedom of Information Act, 5 U.S.C. § 552 (1982 & Supp. IV 1986) ("FOIA"). Judge Mishler held that defendants John Doe Agency ("Agency") and John Doe Government Agency ("Government Agency") were not required under the FOIA to turn over certain Agency documents, a *Vaughn* index and answers to interrogatories. He ruled that disclosure of these materials to plaintiff John Doe Corporation ("Corporation") would "jeopardize" a grand jury investigation and that the materials were therefore exempt from disclosure under the FOIA. We disagree. The docu-

ments in question were generated in routine audits and were not compiled for law enforcement purposes. We also believe that their disclosure would not compromise the secrecy of any grand jury proceeding and that the justifications proffered for denying Corporation access to the *Vaughn* index and answers to Corporation's interrogatories are legally insufficient. We reverse and remand.

BACKGROUND

Corporation is a government contractor. In the course of a routine audit by Agency in 1978, Corporation and Agency exchanged letters regarding the accounting treatment of certain costs incurred by Corporation. In a letter of May 2, 1978, Agency asserted that these costs, which were charged to a technical overhead account, should have been charged directly to certain government contracts. In response, on July 11, 1978, Corporation gave its justification for charging the costs to the overhead account in a lengthy letter to Agency. No further correspondence on the matter took place.

Eight years later, in 1986, the issue was revived in the context of a grand jury investigation concerning possible fraudulent activity by Corporation in connection with its contracts with the government. In the ostensible belief that Agency documents relating to the 1978 correspondence would exonerate it, and no doubt in the unstated belief that the documents would be useful in responding to the investigation or defending criminal charges, Corporation filed a request with the Agency for such documents under the FOIA on September 30, 1986. The Agency denied the request on November 18, 1986, stating that the documents were exempted from disclosure under FOIA Subsection (b)(7)(A) (production "could reasonably be expected to interfere with enforcement proceedings") and (b)(7)(E) (pro-

duction would disclose techniques and procedures for law enforcement investigations). Corporation took an administrative appeal.

Before any response was received from the Agency (which eventually denied the request), Corporation learned that the documents had been transferred to Government Agency and filed an identical FOIA request with Government Agency on February 3, 1987. Government Agency denied the request, relying without elaboration on the FOIA exemption in Subsection (b)(7)(A). After an administrative appeal, the Justice Department, acting for Government Agency, summarily denied Corporation's appeal.

Corporation sought *de novo* review in the Eastern District under 5 U.S.C. § 552(a)(4)(b) of the Agency's and Government Agency's withholding of the documents. In their answer, Agency and Government Agency contended that the documents were exempt from disclosure under FOIA Subsections (b)(3) (matters specifically exempted by other statutes), (b)(5) (certain "inter-agency or intra-agency memorandums or letters"), (b)(7) (law enforcement records that would interfere with or expose enforcement proceedings), and Fed.R.Crim.P. 6(e) ("matters occurring before the grand jury") as incorporated by FOIA Subsection (b)(3). The answer asserted that the documents were obtained by Government Agency from Agency pursuant to a grand jury subpoena.

On September 28, 1987, Corporation moved to compel the preparation of a *Vaughn* index[1] and served interroga-

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[1] A *Vaughn* index, named for *Vaughn v. Rosen*, 484 F.2d 820 (D.C.Cir.1973), *cert. denied*, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974), is an affidavit by a federal agency furnishing the court with enough information to determine the validity of a claimed exemption. A *Vaughn* index provides an itemized list of the requested records, usually detailing the author, date, number of pages, subject

tories seeking information concerning the transmittal of the documents to the Government Agency and the timing of the grand jury subpoena in relation to the Corporation's FOIA requests. In response, the government moved for a protective order to stay preparation of the *Vaughn* index and answers to interrogatories until the government had prepared a summary judgment motion. It stated that the documents had been presented to a grand jury and pertained directly to the subject matter of an investigation. It argued that disclosure of the documents might reveal the identities of witnesses, the "strategy or direction" of the investigation, and otherwise enable Corporation to construct a defense. On December 14, 1987, the district court ordered Agency and Government Agency to prepare a *Vaughn* index and to answer Corporation's interrogatories. The court directed that the index and answers be filed for *in camera* inspection. The government complied on February 16, 1988.

After an *in camera* review of the *Vaughn* index and answers, the district court issued a Memorandum of Decision and Order on March 28, 1988. Judge Mishler, relying on *Hatcher v. United States Postal Service,* 556 F.Supp. 331 (D.D.C. 1982), determined without elaboration that there was a "substantial risk" that disclosure of the documents, the *Vaughn* index, or the answers to interrogatories would "jeopardize" the grand jury proceeding. He ruled, therefore, that defendants were not required to turn over any of the documents, *Vaughn* index and interrogatory answers. Corporation appealed.

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matter of each contested document, and a short explanation of why the document should not be disclosed.

DISCUSSION

This appeal presents several issues. We must resolve whether the district court's decision was final and appealable, whether the documents are exempt under FOIA Subsection (b)(7) or Fed.R.Crim.P. 6(e), and whether plaintiff may have access to the *Vaughn* index and answers to interrogatories.

1. *Appealability of the District Court Order*

We conclude that the March 28, 1988 Memorandum of Decision and Order of the district court was a final order and is appealable under 28 U.S.C. § 1291 (1982). The government contends that the ruling appealed from was interlocutory because it merely withheld the *Vaughn* index and interrogatory answers from Corporation and did not dispose of the exemption claims. In support of that position, the government points to the absence of any motion for judgment by plaintiffs or defendants. We believe it clear, however, that the district court intended a final disposition of the action. After stating that "there is a substantial risk that disclosure of any of this material, the documents, the *Vaughn* index and the answers to [Corporation's] interrogatories, would jeopardize the grand jury proceeding," the district court concluded that "[d]efendants are not required to turn over any of these documents to the plaintiff." The government's contention that "these documents" is a reference only to the *Vaughn* index and answers to interrogatories is belied by the language of the decision, which precluded disclosure of "the documents, the *Vaughn* index and the answers. . . ." The requirement of finality is to be construed in a practical, rather than a technical sense, *Gillespie v. United States Steel Corp.,* 379 U.S. 148, 152-153, 85 S.Ct. 308, 310-11, 13 L.Ed.2d 199 (1964), and the failure to embody the order in a separate

judgment, *see* Fed.R.Civ.P. 58, will not prevent our exercising jurisdiction in light of the evident fact that no further proceedings in the district court were contemplated by Judge Mishler.

The instant case is easily distinguished from the recent decision in *Hinton v. Department of Justice,* 844 F.2d 126 (3d Cir. 1988). In *Hinton*, a district court had simply ordered a federal agency to prepare a *Vaughn* index in response to a FOIA request. On appeal, the Third Circuit ruled that the order to prepare the index was not immediately appealable, either as an injunction, *see* 28 U.S.C. § 1292(a)(1) (1982), or as a collateral order. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528 (1949). In the instant case, the district court denied disclosure of the documents ultimately sought, as well as of the *Vaughn* index and answers to interrogatories.

2. *Application of FOIA Subsection (b)(7)*

Corporation filed its FOIA request after learning that it was under investigation for fraud involving defense contracts. The documents sought are now before a grand jury, and the government argues that release of the documents would interfere with the investigation.

The motive for an FOIA request is not relevant to whether the information must be disclosed. *See, e.g., Federal Bureau of Investigation v. Abramson,* 456 U.S. 615, 631, 102 S.Ct. 2054, 2064, 72 L.Ed.2d 376 (1982); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149, 95 S.Ct. 1504, 1515, 44 L.Ed.2d 29 (1975). The fact that Corporation is under investigation does not, therefore, alter the requester's FOIA rights. *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 & n. 23, 98 S.Ct. 2311, 2327 & n. 23, 57 L.Ed.2d 159 (1978). Although the FOIA

was not principally intended to be a device enlarging the scope of private discovery in litigation, the statute compels disclosure of nonexempt documents to "any person" without regard to the limitations on discovery by parties to civil or criminal litigation. 5 U.S.C. § 552(a)(3).

The district court held that the documents were exempt under FOIA Subsection (b)(7), which exempts from disclosure "matters that are . . . records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information[ ] could reasonably be expected to interfere with enforcement proceedings." Although the district court concluded that disclosure would "jeopardize" the grand jury proceedings, it made no finding as to whether the records sought were "compiled for law enforcement purposes." Such a finding is essential to a valid claim of exemption under Subsection (b)(7). Indeed, the judicial precedent relied upon by the district court, *Hatcher v. United States Postal Service,* 556 F.Supp. 331 (D.D.C. 1982), expressly distinguished between exempted documents created pursuant to a criminal investigation and discloseable documents created as a matter of routine, prior to and independent of the investigation. *Id.* at 334-35.

In the instant case, the documents requested were generated by Agency independent of any investigation in the course of its routine monitoring of Corporation's accounting procedures with regard to Corporation's defense contracts. The records were compiled in 1978, seven years before the investigation began in 1985. They were thus not "compiled for law enforcement purposes" and are not exempted by Subsection (b)(7).

The 1974 amendments to the FOIA make it clear that a governmental entity cannot withhold materials requested under the FOIA on the ground that materials that were not investigatory records when compiled have since acquired

investigative significance. Originally, the FOIA exemption in question applied to "investigatory files." In 1974, however, Congress substituted the word "records" for "files" to insure that documents produced in the routine course of government operations would not be withheld under Subsection (b)(7) merely because they had been commingled with investigative materials generated later in the course of a law enforcement proceeding. *Robbins Tire & Rubber,* 437 U.S. at 227-30, 98 S.Ct. at 2319-21; *see also Abramson,* 456 U.S. at 626-27, 102 S.Ct. at 2061-62. The attempt in the instant case to withhold documents generated in the course of routine audits because they are now part of an investigatory file thus contravenes the obvious intent of the 1974 amendments to FOIA. *See Hatcher,* 556 F.Supp. at 335.

We realize that compliance with the FOIA may compel the government to disclose matters that are ordinarily beyond the scope of discovery in criminal investigations and thus may enable a potential defendant to prepare responses to the investigation and to construct a defense to criminal charges. That is a concern that should be addressed to Congress, however.

3. *Rule 6(e)*

Judge Mishler's decision may also have been based on Fed.R.Crim.P. 6(e)'s prohibition on the disclosure of matters occurring before a grand jury. We believe that Rule is incorporated into the FOIA by Subsection (b)(3), which permits the withholding of documents "specifically exempted from disclosure by statute. . . ." Although (b)(3) does not specifically refer to rules promulgated by the Supreme Court under its rulemaking power, once such rules are effective, they prevail over conflicting statutory law. 18 U.S.C. § 3771 (1982). In view of the superior force

of such rules, it would be anomalous not to consider them in claims of exemption under (b)(3).

Documents requested under the FOIA may be withheld under Rule 6(e) only when their "disclosure would 'tend to reveal some secret aspect of the grand jury's investigation' such matters as 'the identities of witnesses or jurors, . . . the strategy or direction of the investigation. . . .' " *Senate of Commonwealth of Puerto Rico v. United States Dep't of Justice,* 823 F.2d 574, 582 (D.C.Cir.1987). Agency and Government Agency argue that the test has been met here. We disagree. The government defendants have simply failed to demonstrate "a nexus between disclosure and revelation of a protected aspect of the grand jury's investigation." *Id.* at 584. A document that is otherwise available to the public does not become confidential simply because it is before a grand jury. Instead, there must be a showing the disclosure of the document will result in exposure of some other aspect of the grand jury proceeding that is secret. No such showing has been made in the instant case. Indeed, the subject matter of the investigation was sufficiently known to have prompted the FOIA request.

4. *Availability to Corporation of the Vaughn Index and Answers to Interrogatories*

Agency and Government Agency also argue that the *Vaughn* index and answers to Corporation's interrogatories should not be given to Corporation. They contend that there is no general presumption of entitlement to a *Vaughn* index and interrogatory responses in FOIA actions. They further argue that, where the government shows that the balance tips in favor of preserving confidentiality and secrecy, alternative methods, such as *in camera* inspection of the index and answers, may be sub-

stituted. Agency and Government Agency assert that the balance favors nondisclosure because release of the index and interrogatory answers would frustrate the grand jury inquiry.

In camera review of a *Vaughn* index and interrogatory answers is unusual, and differs significantly from *in camera* review of the actual requested documents, a procedure expressly authorized by the FOIA. 5 U.S.C. § 552 (a)(4)(B). Without access to the index or answers, the requester of documents will be unable to mount a complete adversary argument. Existing caselaw allowing *in camera* inspection of a *Vaughn* index appears limited to cases implicating national security interests. *See, e.g., Doyle v. Federal Bureau of Investigation,* 722 F.2d 554, 556-57 (9th Cir.1983); *Hayden v. National Sec. Agency,* 608 F.2d 1381, 1384-85 (D.C.Cir.1979); *Phillippi v. Central Intelligence Agency,* 546 F.2d 1009, 1013 (D.C.Cir.1976).

We need not define the precise circumstances in which a *Vaughn* index may be withheld from the party seeking the documents, however, because the justification proffered for withholding it in the instant case is clearly without merit. If the exemption in Subsection (b)(7) does not protect the documents themselves, disclosure of the *Vaughn* index can hardly be said to trench upon legitimate secrecy interests. So far as the interrogatory answers are concerned, we have found nothing justifying the wholesale claim of a need for secrecy. However, the government should on remand be allowed to bring to the district court's attention any particular matter that would, if disclosed, expose some secret aspect of the grand jury's investigation. Disclosure may be withheld if it would violate Rule 6(e).

CONCLUSION

We reverse the district court's decision upholding the claim of exemption under Section 552(b)(7) and Rule 6(e) and vacate the district court's decision on plaintiff's access to the *Vaughn* index. We remand for further proceedings concerning the answers to interrogatories and any other exemptions claimed by the government for the Agency documents.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 87-2520

[JOHN DOE CORPORATION], PLAINTIFF

v.

[JOHN DOE AGENCY AND
JOHN DOE GOVERNMENT AGENCY], DEFENDANTS

March 28, 1988

MEMORANDUM OF DECISION AND ORDER

APPEARANCES:

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EASTERN DISTRICT OF NEW YORK
225 Cadman Plaza East
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Charles E. Knapp, Assistant
U.S. Attorney

MISHLER, District Judge:

[John Doe Corporation] filed this action pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, seeking production of "all records related to the subject matter of certain correspondence between [John Doe Agency] and [John Doe Corporation] dated May 2, 1978 and July 11, 1978 respectively." (Complaint at ¶ 5).

[John Doe Corporation] moved to compel preparation of an index pursuant to *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977, 94 S. Ct. 1564 (1974). [John Doe Corporation] also sought to compel [John Doe Agency and Joe Doe Government Agency] to answer certain interrogatories.

The defendants opposed disclosing the documents under the FOIA asserting that the documents were exempt under § 552(b)(7)(A) and (E) of the Act. Section 7 of the FOIA exempts from disclosure material which would reveal investigative techniques and procedures in an ongoing grand jury investigation. The government cross-moved for a protective order pursuant to Fed. R. Civ. P. 26(c) to stay the preparation of a *Vaughn* index and answers to plaintiff's interrogatories on the ground that the very index and answers themselves are exempt from disclosure under § 555(b)(7)(A) and (E).

In a Memorandum of Decision and Order dated December 14, 1987 we directed the defendants to prepare a *Vaughn* index and an answer to [John Doe Corporation's] interrogatories and to submit this material to the court for an *in camera* inspection. We made this direction in order that the court might properly determine whether the exemption under the FOIA should apply to the *Vaughn* index and the interrogatories responses requested by [John Doe Corporation]. After examining the *Vaughn* index and the answers to the interrogatories we are satisfied that

there is a substantial risk that disclosure of any of this material, the documents, the *Vaughn* index and the answers to [John Doe Corporation's] interrogatories, would jeopardize the grand jury proceeding. *See Hatcher v. U.S. Postal Service,* 556 F. Supp. 331, 334 (D.D.C. 1982). Defendants are not required to turn over any of these documents to the plaintiff.

SO ORDERED.

/s/ JACOB MISHLER
U.S.D.J.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EDNY Uniondale 87 cv 2520 MISHLER
Docket No. 88-6098

JOHN DOE CORPORATION, PLAINTIFF-APPELLANT

v.

JOHN DOE AGENCY AND
JOHN DOE GOVERNMENT AGENCY, DEFENDANTS-APPELLEES

[Filed June 23, 1988]

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 23th day of June one thousand nine hundred and eighty-eight.

Present: HON. J. EDWARD LUMBARD, HON. THOMAS J. MESKILL, HON. RALPH K. WINTER, Circuit Judges,

Appeal from the United States District Court for the Eastern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the Order of said District Court be and it hereby is reversed and the action be and it hereby is remanded to the said district court for

further proceedings in accordance with the opinion of this court with costs to be taxed against the appellees.

ELAINE B. GOLDSMITH,
Clerk

/s/ EDWARD J. GUARDARO
By: Edward J. Guardaro
Deputy Clerk

ISSUED AS MANDATE: Nov. 28, 1988

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket No. 88-6098

JOHN DOE CORPORATION, PLAINTIFF-APPELLANT

v.

JOHN DOE AGENCY AND
JOHN DOE GOVERNMENT AGENCY, DEFENDANTS-APPELLEES

[Filed Nov. 8, 1988]

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of November, one thousand nine hundred and eighty-eight.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by appellees JOHN DOE AGENCY and JOHN DOE GOVERNMENT AGENCY;

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ FREDRICK CASSIDY
for ELAINE B. GOLDSMITH
Clerk

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OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
JAN 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1083

IN THE

Supreme Court of the United States

October Term, 1988

JOHN DOE AGENCY & JOHN DOE GOVERNMENT AGENCY,
Petitioners,

v.

JOHN DOE CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals correctly decided that documents generated in connection with a 1978 exchange of letters relating to a government agency's "routine monitoring" of a government contractor's accounting procedures "independent of any investigation" could not be withheld under the Freedom of Information Act's exemption for "records or information compiled for law enforcement purposes" despite the transfer of documents to the FBI in 1986 following the contractor's FOIA request.

PARTIES TO PROCEEDING

Petitioners are the Defense Contract Audit Agency, the agency designated in the caption as John Doe Agency, and the Federal Bureau of Investigation, the agency designated in the caption as John Doe Government Agency. Respondent is John Doe Corporation, a pseudonym for a private corporation whose real identity is stated in materials that were filed under seal in the Court of Appeals.*

* Because a John Doe alias is used throughout the Petition and Opposition, and the record below is under seal, the Corporation has not submitted a Rule 28.1 listing of corporate affiliations. Should the Court desire, respondent will submit under seal a statement of its name and its affiliations. The record below contains such a disclosure, and it is still accurate.

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No. 88-1083

IN THE

Supreme Court of the United States

October Term, 1988

JOHN DOE AGENCY & JOHN DOE GOVERNMENT AGENCY,
Petitioners,

v.

JOHN DOE CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

At issue in this Freedom of Information Act ("FOIA") case are documents relating to a 1978 exchange of letters between John Doe Corporation (the "Corporation"), a defense contractor, and the Defense Contract Audit Agency ("DCAA"), the audit arm of the Department of Defense. A panel of the Court of Appeals (Lumbard, Meskill and Winter, Circuit Judges) unanimously decided (with a *Vaughn* index[1] submitted by the government *in camera* before it), that the documents did not constitute "records and information 'compiled for law enforcement purposes' " under FOIA subsection 552(b)(7) ("Exemption 7").

1. A *Vaughn* index is an affidavit identifying the nature and subject matter of documents withheld and explaining the reasons for nondisclosure. *See Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). Its purpose is to permit "the court system effectively and efficiently to evaluate the factual nature of disputed information." *Id.*, 484 F.2d at 826.

(Pet. App. 7a). As explained in Circuit Judge Winter's opinion for the Court:

> In the instant case, the documents requested were generated by Agency independent of any investigation in the course of its routine monitoring of Corporation's accounting procedures with regard to Corporation's defense contracts. The records were compiled in 1978, seven years before the investigation began in 1985. They were thus not "compiled for law enforcement purposes" and are not exempted by Subsection (b)(7).

(Id.).

The only effect of the Court of Appeals decision is to prohibit the government from withholding otherwise non-exempt records by the expedient of transferring the records to an FBI investigative file after they are requested. Given that the decision of the Court of Appeals is based entirely on these unique facts, that there are no decisions in the courts of appeals in conflict with the decision, that the decision is faithful to Congressional intent reflected both in the statutory language and its legislative history, and that the decision is consistent with this Court's construction of the same statutory provision in *Federal Bureau of Investigation* v. *Abramson*, 456 U.S. 615 (1982), this Court should deny the petition for a writ of certiorari.

A. Statement of the Facts

The Petition omits or fails to emphasize a number of critical facts which make it evident that this case is unique and unworthy of review by this Court.

The Corporation is a defense contractor and as such is subject to periodic, routine audits by the Defense Contract Audit Agency. *See* 32 C.F.R. § 357.2 (DCAA Mission), § 357.4 (Responsibilities and Functions). During 1978, in connection with such an audit, there was an exchange of correspondence between the Resident Auditor of the DCAA and the Corporation concerning the proper accounting treatment of costs incurred by the Corporation for a software development facility. In a May 2, 1978 letter, the Resident Auditor contended that the Corporation's costs should have been charged directly to certain government contracts. (C.A. App. 8). In a July 11, 1978 letter, the Corporation submitted a detailed response justifying the charging of the costs to a technical overhead account to which other such costs had been consistently charged. (C.A. App. 4-7). Since the DCAA then dropped the matter, the Corporation assumes that the agency approved the Corporation's position.

On February 21, 1986, more than seven years later, the Corporation received the first of a series of grand jury subpoenas requesting documents relating to the same charging issue.[2] Since the Corporation believed that any DCAA documents relating to the 1978 correspondence would demonstrate the absence of any wrongdoing, the Corporation on September 30, 1986 filed an FOIA request with the DCAA for any documents relating to the subject matter of its 1978 correspondence with the Corporation. (C.A. App. 1-3). That FOIA request is the sole subject matter of this litigation.

On November 4, 1986, DCAA in response to the request stated that more time was needed to collect and evaluate the documents because the correspondence had been written more than eight years before. (*See* C.A. App. 27). Some two weeks later, on November 18, 1986, without further elaboration, DCAA denied the request under FOIA subsections 522(b)(7)(A) and (E)[3] "upon the advice and direction" of an identified Assistant United States Attorney. (C.A. App. 25).

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2. A December 9, 1985 affidavit by an Assistant United States Attorney submitted with the December 15, 1988 Motion in the Court of Appeals for a Stay Pending Application for Certiorari states that the "grand jury was actually empaneled on March 23, 1987." It appears, therefore, that the initial subpoenas were issued by the prosecutors in the name of a non-existent grand jury.

3. The referenced FOIA provisions permit the withholding of "(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) would reasonably be expected to interfere with enforcement proceedings...[or] (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law."

On November 20, 1986, following the Corporation's FOIA request and DCAA's decision, the FBI took possession of the DCAA files. (Pet. 4-5). In an October 19, 1987 District Court affidavit, the Assistant United States Attorney in charge of the investigation represented that he had been "advised that the requested documents were taken by the FBI prior to [Corporation]'s original Freedom of Information Act request to DCAA." (C.A. App. 76). This advice, however, was erroneous and has been corrected in an affidavit by a Department of Justice attorney filed with the December 15, 1988 Motion in the Court of Appeals for a Stay Pending Application for Certiorari. The subsequent affidavit states that "[o]n November 20, 1986, the requested records were transferred from John Doe Agency [DCAA] to John Doe Government Agency [FBI]."[4] There is no dispute, therefore, that the documents had been in the possession of the DCAA at all times since 1978 when the Corporation's FOIA request was made and were not transferred to the FBI until 1986 after the DCAA denied the request. There also can be no dispute, therefore, that at the time of Corporation's FOIA request, the documents were not "an integral part of a legitimate ongoing criminal . . . investigation." (Pet. 17).

B. Proceedings Below

1. The District Court Proceedings

On July 22, 1987, having exhausted its administrative remedies, the Corporation filed a complaint in the District Court for *de novo* review of the DCAA's and FBI's withholding of the requested documents. (C.A. App. 9-12).

4. In another contradiction, the same Assistant United States Attorney implied, in the affidavit filed with the December 15, 1988 Motion for a Stay in the Court of Appeals, that the DCAA documents have not yet been submitted to the grand jury by stating that release of the *Vaughn* index could apprise the Corporation of "documents which may not yet have been reviewed by the grand jury . . . ." In an October 19, 1987 District Court affidavit, however, the Assistant stated that "all of the requested documents have been presented to the grand jury." (C.A. App. 76).

In their answer to the complaint, the federal agencies averred that the documents were exempt from disclosure under various FOIA provisions. (C.A. App. 13-16). On September 28, 1987 the Corporation moved to compel the preparation of a *Vaughn* index. (C.A. App. 45-55). The Corporation also served interrogatories seeking information about DCAA's search for documents responsive to the request and the subsequent transmittal of DCAA's files to the FBI. (C.A. App. 58-62).

In response the government moved for a protective order to stay preparation of the *Vaughn* index and answers to interrogatories until the government prepared a summary judgment motion. (C.A. App. 68-76). The October 19, 1987 affidavit of an Assistant United States Attorney in support of the government's motion explained that "the documents, compiled by DCAA, concern the review and analysis by DCAA of [Corporation's] charging practices on certain defense contracts . . ." and objected to their release. (C.A. App. 75-76). No request was made by the government for *in camera* submission of the *Vaughn* index or answers to interrogatories.

On December 14, 1987 the District Court ordered the DCAA and FBI to prepare a *Vaughn* index and answers to the Corporation's interrogatories, but directed, *sua sponte*, that they be filed with the Court for *in camera* inspection. (C.A. App. 99-102).

On March 28, 1988, the District Court (Mishler, J.) issued a Memorandum of Decision and Order, (Pet. App. 12a-14a), stating that he had reviewed the *Vaughn* index and answers and determined that:

> [T]here is a substantial risk that disclosure of any of this material, the documents, the *Vaughn* index and the answers to [Corporation's] interrogatories, would jeopardize the grand jury proceeding. *See Hatcher* v. *U.S. Postal Service*, 556 F. Supp. 331, 334 (D.D.C. 1982). Defendants are not required to turn over any of these documents to the plaintiff.

(Pet. App. 14a). The Memorandum contains no further explanation of the District Court's decision.

2. Proceedings In The Court of Appeals

On June 23, 1988, following an appeal by the Corporation, the Court of Appeals reversed the District Court's order. The Court of Appeals' opinion deals separately with each of the issues involved in the District Court's rejection of the Corporation's claims: (a) The release of the documents sought; (b) the release of the government's *Vaughn* index; and (c) the release of the government's answers to the Corporation's interrogatories.

a. The Documents

With respect to the documents, the Court of Appeals held that the documents sought are not exempt from disclosure under FOIA subsections (b)(7) or (b)(3), which the Court held incorporates Fed. R. Crim. P. 6(e). The Court of Appeals determined that Exemption 7 is unavailable because the documents were generated by the DCAA "independent of any investigation in the course of its routine monitoring of Corporation's accounting procedures" and "were thus not 'compiled for law enforcement purposes . . . .'" (Pet. App. 7a). With respect to Rule 6(e)'s prohibition on the disclosure of matters occurring before a grand jury, the Court of Appeals held that the government defendants "have simply failed to demonstrate 'a nexus between disclosure and revelation of a protected aspect of the grand jury's investigation.'" (Pet. App. 9a). The Court explained that a document that is otherwise available to the public does not become confidential simply because it is before a grand jury, and that there must be a showing that disclosure "will result in exposure of some other aspect of the grand jury proceeding that is secret." (*Id.*). The Court concluded that "[n]o such showing has been made in this case." (*Id.*).

It is clear from the Court of Appeals' decision that the government is precluded from continuing to resist release of the documents sought based on FOIA exemptions (b)(7) and (b)(3), including Rule 6(e). The government is not precluded from raising "any other exemptions" claimed, (Pet. App. 11a), which, in context, presumably refers to exemption (b)(5) (inter-agency

or intra-agency memoranda or letters), since this was pleaded in the government's answer but has not been ruled upon.

b. The Vaughn Index

With respect to the *Vaughn* index, the Court of Appeals' opinion makes clear that the Court did not decide "the precise circumstances in which a *Vaughn* index may be withheld from the party seeking the documents," (Pet. App. 10a), but only that the justification proffered by the government for withholding the index in this case "is clearly without merit." (*Id.*). The Court explained that: "If the exemption in Subsection (b)(7) does not protect the documents themselves, disclosure of the *Vaughn* index can hardly be said to trench upon legitimate secrecy interests." (*Id.*). While not articulated in the opinion, the same reasoning applies to any contention that the *Vaughn* index should be withheld because of the strictures of Rule 6(e). Since the Court held that the documents themselves could not be withheld under Rule 6(e) because the government "failed to demonstrate 'a nexus between disclosure and revelation of a protected aspect of the grand jury's investigation,'" (Pet. App. 9a), Rule 6(e) likewise provides no basis for withholding an index of those documents.

c. Interrogatory Answers

The Court of Appeals' decision stated that "[s]o far as the interrogatory answers are concerned, we have found nothing justifying the wholesale claim of a need for secrecy." (Pet. App. 10a). Nevertheless, the Court of Appeals held that the government on remand should be allowed to bring to the District Court's attention "any particular matter that would, if disclosed, expose some secret aspect of the grand jury's investigation." (*Id.*).

3. Subsequent Proceedings

The government filed a petition for rehearing or rehearing *en banc* of the June 23, 1988 Court of Appeals decision on August 8, 1988. This petition was denied on November 8, 1988. (Pet. App. 17a).

On November 14, 1988, the government requested a stay of the Court of Appeals mandate pending the Solicitor General's decision whether to petition for certiorari. On November 28, 1988, the Court of Appeals denied the stay and issued its mandate. (Pet. App. 15a-16a).

The Solicitor General did not apply to the Supreme Court for a stay of the mandate and the case returned to the District Court. On December 7, 1988, following the government's refusal to release the *Vaughn* index as required by the Court of Appeals' mandate, the Corporation requested an order from the District Court directing release of the *Vaughn* index. The District Court issued such a directive, but on December 12, 1988 also stayed its order on the request of the government that it be given another opportunity to request a stay from the Court of Appeals.

On December 13, 1988, the government filed a notice of appeal from the District Court's order and filed a motion for a stay in the Court of Appeals pending the filing, "if authorized by the Solicitor General," of a petition for a writ of certiorari seeking review of the June 23, 1988 Court of Appeals' decision.

On December 29, 1988, while the motion for a stay was still pending in the Court of Appeals, the government notified the Court of Appeals that the petition for certiorari had been filed. On January 10, 1989, the Court of Appeals denied the motion for a stay. The government thereupon filed an Application for a recall and stay of the mandate and for a stay of the proceedings below. That same day, Justice Marshall entered an order granting the government's Application pending receipt of a response to the Application, and further order of Justice Marshall or of the Court. On January 17, 1989, the Corporation filed a response to the government's Application requesting that the stay be terminated.

REASONS FOR DENYING THE WRIT

There are at least three compelling reasons why the petition should be denied. First, there is no appellate court decision in conflict with the ruling of the Second Circuit Court of Appeals. Second, the facts of this case—removal of DCAA's eight year old non-exempt records by the FBI only after Corporation had submitted its FOIA request—are unique and do not trigger the

concerns raised by the government. Third, the decision of the Court of Appeals faithfully adheres to both the language of the statute and its legislative history and is entirely consistent with this Court's decision in *Federal Bureau of Investigation* v. *Abramson*, 456 U.S. 615 (1982).

I.

THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER COURT OF APPEALS

The petition acknowledges, as it must, that the decision below, even as construed by the government, is not in conflict with the decision of any other Court of Appeals. While similar issues have been considered in several district court cases,[5] those cases, like this case, have all been fact specific, with some resulting in disclosure[6] and others in withholding[7] of the requested documents.[8] Before taking up the issue that the government seeks to

5. *Raytheon Co.* v. *United States Dep't. of the Navy*, Civ. No. 88-0094 (D.D.C. Jan. 5, 1989); *Gould Inc.* v. *GSA*, 688 F. Supp. 689 (D.D.C. 1988); *Goldschmidt* v. *United States Dep't. of Agriculture*, 557 F. Supp. 274, 276 (D.D.C. 1983); *Hatcher* v. *United States Postal Service*, 556 F. Supp. 331, 335 (D.D.C. 1982); *Fedders Corp.* v. *FTC*, 494 F. Supp. 325 (S.D.N.Y.), *aff'd mem.*, 646 F.2d 560 (2d Cir. 1980).

6. In *Goldschmidt*, the Court directed the release of reports (ILRs) prepared by the Food Safety and Inspection Services after finding that the reports were "generated pursuant to 'routine administration, surveillance or oversight of Federal programs'" and that "the Staff which prepares the ILRs has no enforcement functions." 557 F. Supp. at 276 (citation omitted). In *Hatcher*, a case cited in the Court of Appeals' opinion, the District Court differentiated between records "created during and . . . directly related to the Postal Service's ongoing investigation," 556 F. Supp. at 333 n.1, which were withheld, and those "created prior to or independent of the investigation . . . through routine agency program administration," which were ordered released. 556 F. Supp. at 334.

7. In *Raytheon*, the DCAA audit documents uncovered "defective pricing" and were sent to the Department of Justice where they became the basis for a criminal investigation of Raytheon's pricing practices. In *Gould*, the requested GSA audit reports had been transmitted directly to the Field Office of Investigations and became the basis for a joint investigation by the Office of Investigations and the United States Attorney. In *Fedders*, the FTC documents sought, such as complaint letters and reports of staff interviews, were the basis of, or were conducted in the course of, several ongoing investigations.

8. *Crowell & Moring* v. *Department of Defense*, Civ. No. 87-3432 (D.D.C. Jan. 12, 1989), without any discussion of the stark differences in the facts, does

bring before the Court in the instant petition, this Court would benefit from knowing the views of other Courts of Appeals. Unless a conflict develops among the circuits, there may never be any need for this Court to expend its limited resources on the issue purportedly raised by the instant petition. If such a conflict should develop, this Court's decisionmaking process would benefit from the clash of views in the appellate courts. In any event, consideration of the question raised by the government is premature.

II.

IN VIEW OF THE UNUSUAL FACTS OF THIS CASE, REVIEW OF THE DECISION OF THE COURT OF APPEALS PRESENTS A SUBSTANTIAL RISK OF A RULING BY THIS COURT WHICH IS SO NARROW THAT IT IS UNLIKELY TO CONTROL FUTURE CONTROVERSIES

The government fashions its argument for a grant of certiorari by mischaracterizing the Court of Appeals' ruling and by exaggerating the applicability of the Court's ruling to future controversies. When all the smoke is cleared, it is apparent that the decision below is dependent on the unusual circumstances of this case and will have narrow precedential significance.

A. The Government Has Mischaracterized the Court of Appeals' Decision

The government's petition for certiorari imputes to the Court of Appeals a blanket ruling that documents which are not "originally" compiled for law enforcement purposes cannot under any circumstances be withheld under FOIA Exemption 7. (Pet. 9-10). This is not a fair reading of the Court's opinion.

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express disagreement with the Second Circuit's decision in this case. Unlike the situation in this case, it is apparent from the district court's opinion in *Crowell & Moring* that the 13 documents withheld by the Defense Criminal Investigative Service ("DCIS") (211 were produced) were an integral part of a criminal investigation being conducted by the DCIS before they were requested. Nothing in *Crowell & Moring* suggests that otherwise non-exempt documents can be withheld "merely" because they are placed in an investigative file, which is the thrust of the Court of Appeals decision in this case. (Pet. App. 8a).

The Court's opinion is based on the nature of the documents at issue and the unusual circumstances of this case. As the opinion points out:

> (1) "In the instant case, the documents requested were generated by Agency [DCAA] independent of any investigation in the course of its routine monitoring of Corporation's accounting procedures with regard to Corporation's defense contracts." (Pet. App. 7a).
>
> (2) "The records were compiled in 1978, seven years before the investigation began in 1985." (*Id.*).
>
> (3) "The attempt in the instant case to withhold documents generated in the course of routine audits because they are now part of an investigatory file . . . contravenes the obvious intent of the 1974 amendments to FOIA." (Pet. App. 8a).
>
> (4) "The government defendants have simply failed to demonstrate 'a nexus between disclosure and revelation of a protected aspect of the grand jury's investigation.'" (Pet. App. 9a).
>
> (5) "A document that is otherwise available to the public does not become confidential simply because it is before a grand jury. Instead, there must be a showing the disclosure of the document will result in exposure of some other aspect of the grand jury proceeding that is secret. No such showing has been made in the instant case." (*Id.*).

The Court of Appeals did not declare that FOIA Exemption 7 cannot under any circumstances permit the withholding of any document not "originally" compiled for law enforcement purposes. The FOIA does not use the phrase "originally compiled" and neither does the Court of Appeals' opinion. What the Court of Appeals concludes is that the DCAA documents at issue in this case were not "compiled for law enforcement purposes." (Pet. App. 7a). That is the precise language of FOIA subsection (b)(7).

The Assistant United States Attorney assigned to the investigation acknowledged in his District Court affidavit that the documents "compiled by DCAA, concern the review and analysis by

DCAA of [Corporation's] charging practices on certain defense contracts . . . ." (C.A. App. 76). The conclusory and contradictory claims offered to justify their withholding add up to nothing more than concern about releasing any documents which might be helpful to the subject of a grand jury investigation regardless of the source, age or subject matter of the documents or the circumstances under which they were generated. FOIA Exemption 7 does not embrace any such policy and the government offers no reason for this Court to consider judicially legislating such an amendment to the FOIA.

The government's further complaint that the ruling of the Court of Appeals would require it to "segregate and disclose" non-exempt documents is bewildering. Since 1974, the FOIA itself has required disclosure of reasonably "segregable portion[s]" of requested records "after deletion of the portions which are exempt." 5 U.S.C. § 552(b). Proper handling of a FOIA request by a government agency requires a document by document, segment by segment, review of responsive records to determine whether they are subject to disclosure. The Court of Appeals added nothing to this requirement.

B. The Substantial Risk of a Ruling By This Court of Narrow Application Warrants Denial of the Petition

In its petition for certiorari, the government asserts that the "ruling of the court of appeals would require federal agencies to segregate and disclose all such records or information even though those records or information were, *at the time of the FOIA request*, an integral part of a legitimate, ongoing criminal (or other law enforcement) investigation." (Pet. 17) (emphasis added). The facts in this case, however, are that the documents had been in the archives of the DCAA for more than eight years at the time of the FOIA request and were not being used for any law enforcement purpose by any agency. As the Court of Appeals points out in its opinion, the documents were generated by the DCAA "independent of any investigation" and "were compiled in 1978, seven years before the investigation began in 1985."

(Pet. App. 7a). Under these circumstances, this cannot be fairly described as a case in which the documents were at the time of the request "an integral part" of "an ongoing criminal . . . investigation." (Pet. 17).

But it is the threat of an FOIA request for documents which are "an integral part of a legitimate, ongoing criminal . . . investigation", *id.*, that the government trumpets as a key reason why the issue it seeks to present is of "such importance that it would merit this Court's review." (Pet. App. 16). Indeed, the government avows that it is this threat which will "seriously impair the ability of numerous federal agencies to conduct their law enforcement responsibilities." (Pet. 16). Whatever the significance of this threat to law enforcement, this is not the issue decided below, and this case, therefore, is not the appropriate occasion for its consideration.

III.

IN LINE WITH THE LANGUAGE OF THE ACT, ITS LEGISLATIVE HISTORY AND THIS COURT'S PRIOR RULINGS, THE COURT OF APPEALS CORRECTLY DECIDED THAT THE DOCUMENTS REQUESTED WERE NOT EXEMPT FROM DISCLOSURE

A. The Decision of the Court of Appeals Is Consistent With the Language of the Statute

Exemption 7 permits the withholding of certain "records or information compiled for law enforcement purposes." The Court of Appeals concluded that the DCAA compiled the records "independent of any investigation in the course of its routine monitoring" and that the records were "thus not 'compiled for law enforcement purposes.'" (Pet. App. 7a). The Court of Appeals' decision is unquestionably a proper construction of the plain language of the statute. The legislative history of Exemption 7 confirms the correctness of the Court's construction.

B. The Legislative History Reveals That Congress Intended to Preclude the Conversion of Non-Law Enforcement Records Into Law Enforcement Records By Merely Placing Such Records Into an Investigatory File

As originally enacted, FOIA Exemption 7 permitted the withholding of "investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." Several decisions of the U.S. Court of Appeals for the District of Columbia Circuit interpreted this language to mean that all material found in an investigatory file was exempt from disclosure (essentially the position the government is asserting in this case). In 1974, however, in response to these decisions,[9] Congress amended Exemption 7 by substituting the word "records" for the word "files," and by replacing the phrase "except to the extent available by law to a party other than an agency" with a list of six specific types of harm that would justify withholding "investigatory records compiled for law enforcement purposes." In 1986, Congress further amended the section by removing the word "investigatory" and adding the word "information." As a result, FOIA Exemption 7 now permits the withholding of "records or information compiled for law enforcement purposes," but only to the extent that the production of such law enforcement records or information would cause one of the six specified harms.

The Court of Appeals opinion concluded that the 1974 amendments were intended "to insure that documents produced in the routine course of government operations would not be withheld under subsection (b)(7) merely because they had been commingled with investigative materials generated later in the course of a law enforcement proceeding." (Pet. App. 8a). This conclusion is inescapable: By "substituting the word 'records' for 'files,' Congress intended for courts to 'consider the nature of the particular document as to which exemption was claimed, in order to avoid the possibility of impermissible 'commingling' by an

9. The Court canvassed the legislative history of the 1974 FOIA amendments in *NLRB* v. *Robbins Tire & Rubber Company*, 437 U.S. 214 (1978).

agency's placing in an investigatory file material that did not legitimately have to be kept confidential.'" *Abramson*, 456 U.S. at 626-627, quoting *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. at 229-230.

The 1986 amendment removing the word "investigatory" and adding the word "information" to the exemption does not affect this conclusion one iota. As Senate Report No. 98-221 explains, the 1986 "amendment . . . does not affect the threshold question of whether 'records or information' withheld under (b)(7) were 'compiled for law enforcement purposes.' This standard would still have to be satisfied in order to claim the protection of the (b)(7) exemption. *See, e.g. FBI* v. *Abramson* . . . ."

The argument that a prosecutor can prevent disclosure of non-law enforcement records and information merely by making the documents part of an investigatory file has no support in any provision of the FOIA or its legislative history. It is similar, however, to arguments by the Department of Justice to Congress in opposing the 1974 amendments and in more recent proposals to severely limit access to government documents during litigation. Congress has thus far been unresponsive and at least one key House legislator has stated that the "complaints from the law enforcement community about the negative effects of the FOIA were greatly exaggerated." 132 Cong. Rec. H9463 (daily ed. October 8, 1986) (statement of Rep. English).

Judge Winter's opinion acknowledges that the FOIA "may compel the government to disclose matters that are ordinarily beyond the scope of discovery in criminal investigations . . . ." (Pet. App. 8a). The proper forum for addressing such concerns, however, whether or not exaggerated, is the Congress not the courts. The government's failure to obtain remedial legislation from the Congress is no justification for asking this Court to rewrite the statute.

C. The Decision Below Is Consistent With This Court's Opinion In *Federal Bureau of Investigation* v. *Abramson*

The government's argument that the Court of Appeals has, in effect, inserted the word "originally" into the phrase "records or information compiled for law enforcement purposes," and thus ignored the "plain meaning" of the statute, is disingenuous. But even if the Court of Appeals' decision could be so construed, it would be entirely consistent with this Court's decision in *Abramson*.

In *Abramson*, the Court faced "[t]he sole question ... whether information *originally* compiled for law enforcement purposes loses its Section 7 exemption if summarized in a new document not created for law enforcement purposes." 456 U.S. at 623 (emphasis added). The Court held that "information *initially* contained in a record made for law enforcement purposes *continues to meet the threshold requirements* of Exemption 7 where that recorded information is reproduced or summarized in a new document prepared for a non-law enforcement purpose." 456 U.S. at 631-32 (emphasis added).

Ironically, it was the government which successfully argued in *Abramson* that Exemption 7 authorized the withholding of information which "originated" in a law enforcement record, 456 U.S. at 632, but which now vehemently (and mistakenly) complains that the Court of Appeals is adding these words to the plain meaning of the statute. In fact, the Court of Appeals did not go as far as it might have under *Abramson* and carefully limited its ruling to the facts and circumstances of this case. There are no grounds for complaint by the government about such judicial restraint.

CONCLUSION

Wherefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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REPLY

BRIEF

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No. 88-1083

In the Supreme Court of the United States

OCTOBER TERM, 1988

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v.

JOHN DOE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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5 U.S.C. 552(b)(7)(A) (Supp. IV 1986) 3, 4, 7, 8

Fed. R. Crim. P. 6(e) 3

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1083

JOHN DOE AGENCY AND
JOHN DOE GOVERNMENT AGENCY, PETITIONERS

v.

JOHN DOE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

There is perhaps no better testament to the incorrectness of the ruling of the court of appeals, which makes the threshold "compiled for law enforcement purposes" criterion of Exemption 7[1] depend on whether a document was *originally* compiled for law enforcement purposes, than the position that respondent has taken in its brief in opposition. Rather than acknowledge and defend the holding of the court of appeals, respondent struggles mightily to convince the Court that the court of appeals really did not decide any recurring legal issue and that the court of appeals was instead relying on facts that make this case unique and unworthy of this Court's attention. But see *John Doe Agency* v. *John Doe Corp.*, No. 88-1083

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[1] Exemption 7 of the Freedom of Information Act (FOIA) is 5 U.S.C. 552(b)(7) (1982 & Supp. IV 1986).

(A-552) (Jan. 30, 1989) (Marshall, J., in chambers), slip op. 2, 4. When respondent ultimately does address the merits of an issue resembling the one that the court of appeals decided, respondent succeeds only in refuting an argument that we have never made and in seriously misapprehending the thrust of this Court's decision in *FBI* v. *Abramson,* 456 U.S. 615 (1982). Contrary to respondent's contentions, it is manifest that the decision of the court of appeals in this case is incorrect, and that that erroneous decision would, if allowed to stand, immediately have damaging and far-reaching implications for federal law enforcement.

1. Respondent's effort to paint the opinion of the court of appeals as fact-specific is misdirected. Respondent quotes five statements of the court of appeals that, according to respondent, reflect the "unusual circumstances" of this case. Br. in Opp. 11. Yet the first two statements—that the documents at issue were generated independent of any investigation and seven years before any investigation began—lack any legal significance unless one first subscribes to the holding of the court of appeals that documents are "compiled for law enforcement purposes" only if they were *originally* so compiled.[2] The third statement

[2] It is true, as respondent notes (Br. in Opp. 11), that the court of appeals did not use the phrase "originally compiled." Since the court used the word "compiled" throughout its opinion as if it meant "originally compiled" (*e.g.*, Pet. App. 7a-8a (referring to the requested records as "materials that were not investigatory records when compiled [but] have since acquired investigatory significance")), the court never paused to make explicit what was certainly implicit in its opinion. Indeed, one can find in the court's opinion no basis, other than construing "compiled" to mean "originally compiled," for holding that the documents at issue were not "compiled for law enforcement purposes."

that respondent quotes[3] is merely a legal conclusion—which we have shown to be incorrect (see Pet. 11-13).[4] And the fourth and fifth statements that respondent quotes come from a part of the opinion (Pet. App. 8a-10a) that discusses an issue (the application of Fed. R. Crim. P. 6(e)) completely different from the one on which we petitioned for certiorari. Notwithstanding respondent's effort to cloud the point, the passage of the opinion below that deals with Exemption 7 (Pet. App. 6a-8a; see Pet. 6-7) relies on one and only one fact in determining that the records at issue were not "compiled for law enforcement purposes": that they were generated by John Doe Agency for purposes other than law enforcement before they were compiled by John Doe Government Agency for law enforcement purposes.

The court of appeals most assuredly did not rest its decision on any doubt about the proposition that release of the records at issue would jeopardize law enforcement proceedings; the court never disputed that this case would come within the terms of Exemption 7(A) if the threshold "compiled for law enforcement purposes" criterion were met.[5] See generally *John Doe Agency* v. *John Doe Corp.*,

[3] "The attempt in the instant case to withhold documents generated in the course of routine audits because they are now part of an investigatory file * * * contravenes the obvious intent of the 1974 amendments to FOIA." Pet. App. 8a.

[4] The incorrectness of that legal conclusion is also demonstrated in several district court opinions, including the recent opinion in *Crowell & Moring* v. *Department of Defense,* Civ. No. 87-3432 (D.D.C. Jan. 12, 1989), slip op. 13-14. We have previously provided the Clerk ten copies of the *Crowell & Moring* opinion, and we are now also providing ten copies of the opinion in *Raytheon Co.* v. *Department of the Navy,* Civ. No. 88-94 (D.D.C. Jan. 5, 1989).

[5] This is equally true of disclosure of the *Vaughn* index. In its brief in opposition (at 5), as in its response to our stay application, respondent incorrectly implies that we somehow consented to the public filing

No. 88-1083 (A-552) (Jan. 30, 1989) (Marshall, J., in chambers), slip op. 3. Respondent now suggests (Br. in Opp. 11-12) that the government's assertion of Exemption 7(A) was too broad for reasons other than the application of the threshold "compiled for law enforcement purposes" test, but that issue was resolved against respondent by the only court that has passed on it (Pet. App. 13a-14a) and simply is not before this Court.[6]

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of the *Vaughn* index and answers to interrogatories, but that the district court imposed an in camera procedure wholly on its own. As we have explained in our reply in support of the stay application, the government opposed the preparation of any *Vaughn* index or answers to interrogatories, on the ground that giving such documents to respondent would itself reveal information that respondent is seeking in this lawsuit but that should instead remain secret (C.A. App. 65-77). Because it took that broad position in resisting discovery, the government did not make the fallback suggestion that the documents be prepared but be submitted in camera, but the district court ordered that procedure because of the government's legitimate concerns. The district court has more recently found specifically that disclosure of the *Vaughn* index "would jeopardize the grand jury proceeding" (Pet. App. 14a).

[6] Respondent errs in calling our justifications for the application of Exemption 7(A) "conclusory and contradictory" (Br. in Opp. 12). The *publicly proffered* justifications for invoking Exemption 7(A), while hardly conclusory, are of necessity somewhat less specific than they otherwise might be, because greater specificity in pleadings that are accessible to respondent would itself compromise the integrity of the ongoing law enforcement investigation. There is nothing deficient—and certainly neither court below suggested that there is anything deficient—in the combined public, sealed, and in camera submissions that we have made to justify invoking Exemption 7(A). Nor is there anything "contradictory" about our exemption claims. The subpoenas were issued in the name of a regularly sitting grand jury, and the documents were then presented to a different grand jury that was empaneled on March 23, 1987, and was convened specifically for the investigation in which respondent is a target (see Br. in Opp. 3 n.2). That technique is standard and unquestionably proper. See generally, *e.g.*, *United States* v. *Thompson*, 251 U.S. 407, 413-414 (1920); *In re Grand Jury Proceedings, Sutton*, 658 F.2d 782, 784 (10th Cir. 1981); *United States* v. *Simmons*, 591 F.2d 206 (3d Cir. 1979); *United States* v. *Goodman*, 628 F. Supp. 323, 325 (M.D. Pa. 1985); *United States* v. *Kleen Laundry & Cleaners, Inc.*, 381 F. Supp. 519 (E.D.N.Y. 1974). The December 9, 1988, declaration of Assistant United States Attorney Sean O'Shea refers to "documents which may not yet have been reviewed by the grand jury" (see Br. in Opp. 4 n.4) because we are concerned about documents that *the government does not yet have*. There is no contradiction between that reference and the correct statement in an earlier affidavit that all of the documents that are the subject of respondent's FOIA request *have* been presented to the grand jury.

Respondent further argues that "[t]he only effect of the Court of Appeals decision is to prohibit the government from withholding otherwise non-exempt records by the expedient of transferring the records to an FBI investigative file after they are requested" (Br. in Opp. 2). Yet the opinion below does not even mention—much less treat as dispositive—the fact that the documents at issue were transferred from John Doe Agency to John Doe Government Agency after John Doe Agency received respondent's FOIA request. The effect of the decision below, if followed, would be to make application of Exemption 7 depend on when the government first generated or obtained particular documents—the consideration that the court of appeals *did* treat as dispositive—not on a consideration that the court of appeals did not even mention. And, as we showed in the petition, making disclosure mandatory for all documents not originally compiled for law enforcement purposes is a serious error.

Nor is respondent correct in suggesting that the court of appeals *should have* ruled the way it did merely because John Doe Government Agency, as part of a legitimate law enforcement investigation, compiled these documents while respondent's FOIA request was pending, rather than earlier. FOIA litigation is not a game in which Congress

intended that law enforcement interests be frustrated so long as the FOIA requester asks the noninvestigative agency for particular records before the investigative agency does the same. Cf. *FBI* v. *Abramson, supra* (refusing to exalt format over substance in construing "compiled for law enforcement purposes"). Rather, in this area of FOIA law as in others, it is entirely appropriate for the government, after a FOIA request as well as before, to take steps to ensure that sensitive documents are not disclosed.[7]

There is, moreover, not the slightest support in the record of this case for the proposition that, rather than engaging in legitimate law enforcement activity, John Doe Government Agency took these documents from John Doe Agency *for the purpose of* making an otherwise inapplicable FOIA exemption apply. Rather, as is obvious from the subpoenas issued in February 1986 and thereafter, which are what prompted respondent's September 1986 FOIA request in the first place, the government long before September 1986 was engaged in a law enforcement investigation that focused on, among other things, respondent's accounting practices that are the subject of respondent's 1978 correspondence with John Doe Agency. John Doe Government Agency's request to John Doe Agency for the documents at issue here, and the subsequent transfer of documents in accordance with that request, was a natural and timely outgrowth of that investigation. Respondent has no right to obtain disclosures that "could reasonably be expected to interfere with enforcement proceedings," 5 U.S.C. 552(b)(7)(A) (Supp. IV 1986), just because its request for the records preceded rather than followed John Doe Government Agency's request to the same agency for the same documents as part of a legitimate law enforcement investigation.

[7] See generally *Goldberg* v. *Department of State*, 818 F.2d 71, 77 (D.C. Cir. 1987) (government may classify documents, and thus bring them within FOIA Exemption 1, 5 U.S.C. 552(b)(1), after FOIA request has been received), cert. denied, No. 87-655 (Feb. 29, 1988); *Miller* v. *Department of State*, 779 F.2d 1378, 1388 (8th Cir. 1986) (same); *Baez* v. *Department of Justice*, 647 F.2d 1328, 1332-1333 (D.C. Cir. 1980) (same).

2. To the very limited extent that respondent even tries to defend the analysis of the court of appeals (Br. in Opp. 13-16), respondent merely shows that it would be wrong to construe Exemption 7 to apply to every document in a law enforcement file, without further inquiry. But we have never asked that Exemption 7 be so construed in this case.[8] We ask, instead, that the Court construe Exemption 7 to make withholding or disclosure of a particular record that has been compiled for law enforcement purposes (whether when originally obtained or at some later time) turn on whether the criteria of Subsections (A)-(F) of Exemption 7 are met.[9] The court of appeals, by contrast, made disclosure turn entirely on the fact that the documents at issue were originally generated in 1978 but compiled for law enforcement purposes much later, without regard to the important substantive criteria of Subsections (A)-(F). That holding, as we have shown in our petition, disregards

[8] We entirely agree with respondent that "[t]he argument that a prosecutor can prevent disclosure of non-law enforcement records and information merely by making the documents part of an investigatory file has no support in any provision of the FOIA or its legislative history." Br. in Opp. 15.

[9] *That* determination does indeed depend on a "document by document, segment by segment, review of responsive records to determine whether they are subject to disclosure" (Br. in Opp. 12)—a process to which we by no means object. We do object (see Pet. 17 n.16), however, to the quite difference requirement, which would follow from the reasoning of the court of appeals, that the government sift through a file of documents, all compiled for law enforcement purposes, and without regard to the criteria of Subsections (A)-(F) disclose each document that was not *originally* so compiled.

the plain language of the statute, misreads the legislative history, and is contrary to this Court's approach in *FBI* v. *Abramson*, 456 U.S. 615 (1982).[10]

Respondent's attempt to draw support from *Abramson* (Br. in Opp. 16) is strained and misguided. In *Abramson*, this Court held that a document once compiled for law enforcement purposes does not lose its Exemption 7 character of having been so compiled when it is recompiled for other purposes. That conclusion followed both from the language of the statute ("compiled" as opposed to "compiled solely" or some other variant) and from the unmistakable, overriding objective of Congress to protect records that meet the criteria of Subsections (A)-(F). The conclusion did not follow from any judicial insertion of the word "originally" into the phrase "compiled for law enforcement purposes," as respondent suggests. This Court's language and rationale in *Abramson* are sharply at odds with respondent's position, not an aid to it.

3. Respondent urges this Court to let the erroneous decision of the Second Circuit stand—and let respondent obtain disclosures that are expected to cause damage to an important criminal investigation of fraud in defense contracting—on the ground that the decision does not conflict with any decision of another court of appeals (Br. in Opp. 9-10). As Justice Marshall observed in granting our application for a stay in this case, however, the case law has evolved sufficiently, and the divergent positions are sufficiently well developed, that this issue is an appropriate one for review by this Court. See *John Doe Agency* v. *John Doe Corp.*, No. 88-1083 (A-552) (Jan. 30, 1989) (Marshall, J., in chambers), slip op. 4.

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[10] Last month alone, two courts agreed with our analysis and disagreed with that of the Second Circuit in this case. *Crowell & Moring* v. *Department of Defense*, slip op. 5-15; *Raytheon Co.* v. *Department of the Navy*, slip op. 8-9.

Moreover, allowing the erroneous decision in this case to stand, even as the law of the Second Circuit, would likely have severely negative consequences for the public interest in general and for investigations of fraud in defense contracting in particular. The offices of the United States Attorneys for the Eastern, Southern, Northern, and Western Districts of New York and the Districts of Connecticut and Vermont inform us that there are approximately 45 pending investigations of defense contractor fraud in those districts. Each of those investigations—as well as numerous other investigations arising out of the activities of non-law-enforcement agencies[11]—could be seriously impaired by a FOIA request similar to respondent's if the rule announced in the decision below were to remain the law of the Second Circuit while a sharper conflict in the circuits developed.

For the foregoing reasons and those given in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

WILLIAM C. BRYSON
Acting Solicitor General

FEBRUARY 1989

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[11] *E.g.*, *American Business Institute* v. *Department of Education*, Civ. No. 88-5165 (S.D.N.Y.) (pending FOIA case arising out of Department of Education investigation into fraudulent participation in federal student financial assistance programs).

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JOINT

APPENDIX

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

(4)

No. 88-1083

In the Supreme Court of the United States

OCTOBER TERM, 1988

JOHN DOE AGENCY AND
JOHN DOE GOVERNMENT AGENCY,

PETITIONERS,

v.

JOHN DOE CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI
FILED DECEMBER 29, 1988
CERTIORARI GRANTED FEBRUARY 21, 1989

103pp

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1083

JOHN DOE AGENCY AND JOHN DOE GOVERNMENT AGENCY,
PETITIONERS,

v.

JOHN DOE CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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The following opinions, decisions, judgment, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed petition for a writ of certiorari:

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Court of appeals opinion, dated 6/23/88	1a
Court of appeals judgment, dated 6/23/88 and issued as mandate 11/28/88	15a
Court of appeals order appeals denying rehearing and rehearing in banc, dated 11/8/88	17a

Note: All references to the names and other identifying information of petitioners and respondent have been omitted in the printing of this joint appendix and the appendix to the petition for a writ of certiorari. References (with brackets) to "[John Doe Corporation]," "[Corporation]," "[John Doe Agency]," "[Agency]," "[John Doe Government Agency]," "[Government Agency]," etc. indicate that the true name of the person or entity referred to appears in the original document but has been omitted in printing. References without brackets indicate that the original document uses the pseudonym and has been reproduced without alteration.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EDNY Uniondale 87 cv 2520 MISHLER
Docket No. 88-6098

JOHN DOE CORPORATION,

PLAINTIFF-APPELLANT,

v.

JOHN DOE AGENCY AND
JOHN DOE GOVERNMENT AGENCY,

DEFENDANTS-APPELLEES.

DOCKET ENTRIES IN THE COURT OF APPEALS

DATE	FILINGS—PROCEEDINGS
4-14-88	Appellant JOHN DOE CORPORATION SEALED motion for expedited appeal, FILLED. (orig to SAB per AH). BFM
4-14-88	Appellant JOHN DOE CORPORATION SEALED motion for leave to seal USCA file, FILED. (orig to AH). BFM
4-14-88	Appellant JOHN DOE CORP. SEALED Form C, *RECEIVED.* w/pfs. (orig to SAB). BFM
4-14-88	Appellant JOHN DOE CORP. SEALED Form D, *RECEIVED.* (orig to SAB). BFM
4-15-88	Order granting Appellant JOHN DOE CORPORATION SEALED motion for expedited appeal, and further noting that Appellant's brief be filed 4/20, and appellee's brief be filed two (2) weeks later, on 5/4/88 appellant's reply brief be filed on 5/11, and oral argument be scheduled during the week of 5/16/88, Filed. (BY: JUDGE WINTER) AV

DATE	FILINGS—PROCEEDINGS	
4-15-88	Order granting Appellant JOHN DOE CORP. SEALED Motion for leave to seal USCA file, until a panel hears the appeal. Further sealing will be on the order of that panel, filed. (BY: JUDGE WINTER)	AV
4-15-88	Certified copy of order issued to district court, EDNY	AV
4-18-88	Copy of district court notice of appeal on behalf of Appellant JOHN DOE CORPORATION, Filed. (SEALED)	AV
4-18-88	Appellant JOHN DOE CORP., Form C, Filed. (RECEIVED ON 4/14/88 W/PFS) (SEALED)	AV
4-18-88	Appellant JOHN DOE CORP., Form D, Filed. (RECEIVED ON 4/14/88) (SEALED)	AV
4-18-88	Copy of receipt re: payment of docketing fee in district court, Filed. (SEALED)	AV
4-20-88	Attorney correspondence re: disclosure of interested party, received. (SEALED)	AV
4-22-88	Appellant JOHN DOE CORP., Brief, Filed. (UNDER SEALED)	AV
4-22-88	Appellant JOHN DOE CORP., Joint Appendix, Filed. (UNDER SEALED)	AV
4-28-88	Copy of district court docket entries, Filed. (SEALED)	AV
5-05-88	Appellee JOHN DOE AGENCY briefs FILED (wp/s)	RS
5-11-88	Appellant JOHN DOE CORPORATION SEALED reply brief filed, w/pfs.	RR
5-13-88	Record on Appeal filed, (Original papers of the U.S. District Court—UNDER SEAL).	RR
5-16-88	Appellant JOHN DOE CORP. supplemental appendix *received* (w/pfs) (UNDER SEAL) (3 copies given to calendar)	SV

DATE	FILINGS—PROCEEDINGS	
5-17-88	Appellant JOHN DOE CORPORATION supplemental appendix, filed. 2/pfs (UNDER SEAL) (per Calander section).	MPW
5-18-88	Case heard before Lumbard, Meskill, Winter, C.JJ.	SV
5-19-88	Appellee JOHN DOE AGENCY letter requested by court filed (SEALED)	GB
5-19-88	RECORD on Appeal 1st Supp. (Transcript of Phone Conference dated 5/6/88 filed (SEALED)	GB
6-23-88	Judgement reversed, vacated in part and remanded, published signed opinion, Winter, C.J.	RR
6-23-88	Judgement filed.	RR
7-07-88	One jiffy bag envelope containing motion under seal received.	RR
7-08-88	Letter authorizing Clerk to open jiffy bag and removing 3 sealed envelopes containing motion under sealed, filed.	RR
7-08-88	Appellee DOE AGENCY GOVERNMENT Motion (under seal) for an extension of time within which to file a petition for rehearing or rehearing en banc, filed.	RR
7-08-88	Appellant DOE CORPORATION opposition to request for extension of time to consider filing petition for rehearing filed (w/pfs)	gb
8-08-88	Appellee DOE AGENCY GOVERNMENT (SEAL) petition for rehearing *received*	gb
9-13-88	Appellee DOE AGENCY GOVERNMENT letter pursuant to Rule 28J, FRAP received (copies to panel)	gh
9-15-88	Copy of ltr of S.C. granting extension of time to file petition for	

DATE	FILINGS—PROCEEDINGS
9-20-88	Appellee DOE AGENCY GOVERNMENT letter and copy of Justice Marshall Order extending time for filing a petition for certiorari until November 20, 1988, distributed to panel (Lumbard, Meskill and Winter, JJ.).
9-20-88	Order granted appellee DOE AGENCY GOVERNMENT extension of time to file petition for rehearing or rehearing in banc, fld (ALK)
9-20-88	Appellees JOHN DOE AGENCY and JOHN DOE GOVERNMENT AGENCY Petition for Rehearing or Rehearing En Banc filed SEALED
11-08-88	Order denied petitioner John Doe Agency and John Doe Government Agency petition for rehearing or suggestion for rehearing in banc, fld
11-15-88	Appellees motion for stay *received*
11-16-88	Objections to motion for stay *received*
11-18-88	Appellees' motion and supporting affidavit to Stay in the mandate [including supplement to motion] fld (orig. to EJG on 11-18)
11-18-88	Objections to stay motion fld [received 11-16-88]
11-28-88	Order denied stay of mandate filed (RKW JEL)
11-28-88	Mandate (judgment and opinion) issued
12-16-88	Appellees John Doe Agency and John Doe Government Agency motion for stay of district court order pending petition for writ of certiorari seeking Supreme Court review of this Court's decision, filed (RKW) (PER KB)
12-20-88	Appellant opposition to motion for stay pending application for certiorari fld (RKW) (PER KB)
12-20-88	United States Attorney letter to be made part of the application for stay fld (RKW) (PER KB)

DATE	FILINGS—PROCEEDINGS
1-11-89	Order by Supreme Court recalling and staying the mandate of the 2d Circuit pending further order of the Supreme Court fld GH
1-17-89	Notice of filing of petition for writ of certiorari filed SC:88-1083 AB
1-18-89	Certified copy of order recalling mandate issued to EDNY
1-30-89	Order of Supreme Court continuing stay pending action on petition for writ of cert. Further, should the petition for cert be denied, this order is to terminate automatically. If petition granted, this order is further continued pending the sending down of the judgment of Supreme Court, fld (SC No. A-552 (88-1083)GH
2-02-89	Certified copy of Order of Supreme Court continuing temporary stay fld GH
2-21-89	Certified copy of order of Supreme Court granting petition for writ of certiorari filed. (88-1083) AB
2-27-89	Record on appeal and Court of Appeal record transmitted to Supreme Court. AB

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 87-2520

[JOHN DOE CORPORATION],

PLAINTIFF,

v.

[JOHN DOE AGENCY AND
JOHN DOE GOVERNMENT AGENCY],

DEFENDANTS.

DOCKET ENTRIES IN THE DISTRICT COURT

DATE	NR.	PROCEEDINGS
1987		
7/22	1	Complaint for injunctive relief, SI. eod 7/22/87. pw
8/5	2	Notice of appearance by Fried, Frank, Harris, Shriver & Jacobson & Marshall for pltff [John Doe Corporation], eod 8/10/87. pw
8/13	3	By Mishler, J, dtd. 8/12/87, Order granting leave for John T. Boese & Mira N. Marshall to appear pro hac vice as counsel for pltff, eod 8/12/87 cm pw
9/10	4	ANSWER from deft. eod 9/11/87 cp
9/11	5	Affidavit of service as to deft. [John Doe Agency] on 8/4/87 eod 9/14/87 cp
9/11	6	Affidavit of service as to deft. [John Doe] on 8/4/87 eod 9/14/87 cp
9/30	7	Pltff's notice of motion to compel preparation of a "Vaughn Index", eod 10/5/87 pw
9/30	8	Pltff's memo of points and authorities in support of pltff's motion No. 7, eod 10/5/87 pw

DATE	NR.	PROCEEDINGS
9/30	9	Order undtd. that defts shall serve an index containing an itemized inventory of every agency record or portion resposive to pltff's request which the defendants assert to be exempt from disclosure, eod 10/5 pw
10/23	10	Pltff's memo of points and authorities in opposition to deft's motion for a protective order, eod 10/23/87 pw
10/20	11	Defts notice of motion for a protective order, eod 10/23/87 pw
10/20	12	Declaration of Sean O'Shea in support of deft's motion, eod 10/23/87 pw
10/20	13	Defts memo of law in support of motion No. 11, eod 10/23/87 pw
10/23	—	Before Mishler, J., Case called. Counsel for all sides present. Motion to compel preparation of Vaughn Index argued. Decision reserved pw
10/24	14	Ltr dtd. 10/21/87 from J. Boese to J. Mishler re: to seal the O'Shea declaration, eod 10/24/87 pw
12/14	—	FILE UNDER SEAL pw
12/14	15	By Mishler, J., dtd. 12/14/87 Order that defts shall w/in 60 days submit to the ct for in camera examination if a Vaughn index containing an itemized indexed inventory of every agency record or portion responsive to pltff's FOIA request and also directed to submit answer to pltff's interrogs, eod 12/14/87, pw
12/14	16	By Mishler, J., dtd. 12/14/87 Memo of dec and order directing the submission of a Vaughn index and answer to pltff's interrogs for in camera inspection, eod 12/14/87. pw

DATE	NR.	PROCEEDINGS
1988		
2/16	17	Ltr dtd. 2/16/88 from C. Knapp to J. Mishler re: requesting ct to release documents submitted in camera, eod 2/16/88 pw
2/16	18	In Camera DECLARATION of [John Doe], eod 2/16/88 (dft) pw
2/16	19	In Camera Declaration of [John Doe], eod 2/16/88 (dft). pw
3/28	20	By Mishler, J., dtd. 3/28/88 Memo of dec and order that defts are not required to turn over documents as mentioned in memo of dec and order dtd. 12/14/87, eod 3/28/88 pw
3/24	—	FILE UNSEALED AND RESEALED 3/28/88 pw
4/14	21	NOTICE OF APPEAL by pltff from ordered entered 3/28/88, eod 4/14/88. Clerk mails copy of notice of appeal w/cert copy of docket sheet and notice that the appellant has paid fee of 105.00 pw
4/18	22	Notice of motion for submission under seal Ordered that the record, orders on appeal be kept under seal, eod 4/18/88 ack mailed 88-8026 pw
4/18	23	Notice of motion for expedited appeal, ordered that the motion is hereby granted, eod 4/18/88 ack mailed. pw
4/18	—	FILE UNSEALED AND RESEALED. pw
5/10	—	RECORD ON APPEAL CERT AND SEALED TO USCA. 88-6098. pw
5/17	24	Transcript of phone conf dtd. 5/6/88, eod 5/16/88 pw
5/17	—	SUPPLEMENTAL RECORD OF APPEAL CERT AND MAILED TO USCA. 86-6098 pw

DATE	NR.	PROCEEDINGS
11/30	25	TRUE COPY OF MANDATE dtd 11/28/88, that order is reversed and action is remanded to district court for further proceedings in accordance w/opinion of CofA w/costs to be taxed against appellees, eod 12/12/88. gmh
12/12	26	LETTER datd 12/07/88 to pltf atty from U.S. Depart of Justice, deft, re: memorialize ruling and orders of court, eod 12/12/88. gmh
12/12	27	ORDER by MISHLER, J., dtd 12/12/88, that defts' application seeking leave to litigate further the issue of release of Vaughn index is denied, that defts are foreclosed from litigating any other issue pertaining to immediate release of Vaughn index and ordered that release of Vaughn index is stayed pending defts' application for further stay to CofA to be made by 12/16/88, eod 12/13/88, c/m. gmh
12/13	28	NOTICE OF MOTION by pltf ret. 12/21/88 @9:00 am for an order requiring defts to release to [Corporation] the answers to interrogatories, eod 12/13/88. gmh
12/13	29	MEMORANDUM OF POINTS AND AUTHORITIES by pltf in support of motion for release of defts' answers to interrogatories, eod 12/13/88. gmh
12/13	30	NOTICE OF APPEAL by defts dtd 12/13/88, from order denying defts' application to litigate the issue of release of Vaughn index, entered on 12/12/88, c/m, sent cert. copy of docket sheet and copy of notice to CofA, FILED AND SENT TO COFA UNDER SEAL, eod 12/22/88.gmh

DATE	NR.	PROCEEDINGS
12/22	31	NOTICE OF CROSS MOTION by defts, to permit defts to amend their answer ret. 12/21/88 @9:00 am, memo of law in support enclosed, FILED UNDER SEAL, eod 12/22/88. gmh
1989		
1/17	32	CIVIL APPEAL SCHEDULING ORDER No. 1 from CofA dtd 1/12/89, that record on appeal be filed by 2/3/89, eod 1/20/89. gmh
1/18	33	ORDER, copy from Supreme Court dtd 1/10/89 that mandate dtd 11/28/88 be recalled and stayed and order from USDC EDNY entered 12/12/88 be stayed pending receipt of response to application filed 1/17/89 and further order, eod 1/20/89. gmh
1/19	34	TRUE COPY OF MANDATE from CofA, that mandate dtd 11/28/88 is recalled and stayed pending further order of Supreme Ct. or a Justice, eod 1/20/89. gmh
2/22	35	TRUE COPY OF MANDATE from CofA dtd 2/21/89, that appeal is withdrawn from active consideration, reinstatement of appeal in writing by 20 days after Supreme Court acts on cert petition, eod 2/24/89. gmh

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK
LONG ISLAND DIVISION

Civil Action No. CV-87-2520 (Mishler, J.)

COMPLAINT FOR INJUNCTIVE RELIEF

[JOHN DOE CORPORATION]

PLAINTIFF,

v.

[JOHN DOE AGENCY]

and

[JOHN DOE GOVERNMENT AGENCY]

DEFENDANTS.

1. This is an action under the Freedom of Information Act, 5 U.S.C. § 552, as amended ("FOIA"), to order the production of agency records, relating to the subject matter of correspondence between [John Doe Agency ("Agency")] and [John Doe Corporation ("Corporation")] dated May 2, 1978 and July 11, 1978, which were improperly withheld from plaintiff.

2. This court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B).

3. [Corporation] is the person on whose behalf the records were requested.

4. Defendant [Agency] is an agency of the United States, and originally generated and had or has possession of some or all of the records at issue. [John Doe Government Agency ("Government Agency")] is also an agency of the United States, and its agents currently

have possession of some or all of the documents at issue.

5. By letter dated September 30, 1986 [Corporation], by counsel, requested from [Agency] copies of all records related to the subject matter of certain correspondence between [Agency] and [Corporation] dated May 2, 1978 and July 11, 1978, respectively. Copies of the letters were attached to the request. The letters concerned the proper accounting treatment of charges for a Software Development Facility.

6. By letter dated November 18, 1986 the Boston Regional Director of [Agency] denied that request for records, on the ground that Dennis E. Milton, Assistant U.S. Attorney, Eastern District of New York, directed that the documents be withheld from disclosure under sections 552(b)(7)(A) and (E) of the FOIA.

7. By letter dated January 15, 1987 [Corporation], by counsel, appealed the denial.

8. By letter dated February 18, 1987 [Agency] responded to the appeal by informing [Corporation's] counsel that the records were not in its possession and that the request had been referred to Dennis E. Milton, who now controlled the documents, for his action. The documents, according to [Agency], were in the physical possession of [Government Agency]. [Agency] made no attempt in its letter to explain the discrepancy between this letter and the [Agency] letter of November 18, 1986.

9. By letter dated February 3, 1987 [Corporation] filed a Freedom of Information Request with [Government Agency], seeking access to the [Agency] records at issue.

10. By letter dated June 9, 1987 [Government Agency] denied the request.

11. By letter dated June 15, 1987 [Corporation], by counsel, appealed the denial. The Department of Justice acknowledged in a letter dated June 22, 1987, that it had received the appeal on June 17. This letter did not claim that extraordinary circumstances required additional time for response. Counsel requested a timetable for resolution of this FOIA appeal, but no specific timetable was proposed.

12. More than twenty days have passed since the Department of Justice received [Corporation's] appeal and no substantive response has been made. [Corporation] has therefore exhausted its administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(A) and (C).

13. [Corporation] has a right of access to the requested records under 5 U.S.C. § 552(a)(3), and there is no legal basis for defendants' denial of such access.

WHEREFORE, plaintiff prays that this court:

(1) Order defendant to make the records available as requested;

(2) Expedite the proceedings as provided in 5 U.S.C. § 552(a)(4)(B);

(3) Award plaintiff his costs and reasonable attorney fees in this action, pursuant to 5 U.S.C. § 552(a)(4)(E);

(4) Issue a written finding, pursuant to 5 U.S.C. § 552(a)(4)(F), that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholding; and

(5) Grant such other and further relief as the Court may deem just and proper.

Dated: New York, New York
July 22, 1987

FRIED, FRANK, HARRIS, SHRIVER &
JACOBSON
(A Partnership Including Professional
Corporations)

By: /s/ RICHARD M. MICHAELSON
One New York Plaza
New York, New York 10004
(212) 820-8000
and
FRIED, FRANK, HARRIS, SHRIVER &
JACOBSON
(A Partnership Including
Professional Corporations)
1001 Pennsylvania Avenue, N.W.
Suite 800
Washington, D.C. 20004
(202) 639-7000

ATTORNEYS FOR PLAINTIFF

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

A N S W E R
Civil Action No. CV-87-2520 (Mishler, J.)

[JOHN DOE CORPORATION],

PLAINTIFF,

v.

[JOHN DOE AGENCY,
JOHN DOE GOVERNMENT AGENCY]

DEFENDANTS.

Defendant [John Doe Agency (Agency)] and [John Doe Government Agency, (Government Agency)] by their attorney, ANDREW J. MALONEY, United States Attorney for the Eastern District of New York, Charles E. Knapp, Assistant United States Attorney, of counsel, for their answer to the complaint herein alleges upon information and belief as follows:

1. The allegations contained in paragraphs 1 and 2 of the Complaint constitute a legal conclusion to which no answer is required. If a response is necessary, the allegations contained in the paragraphs are denied.

2. The allegations contained in paragraph 3 of the Complaint is admitted.

3. The allegations contained in paragraph 4 of the Complaint are denied except that defendant [Government Agency] avers that it has in its possession, pursuant to a lawful grand jury subpoena, certain documents responsive to plaintiff's FOIA request.

4. The allegations contained in paragraphs 5, 6 and 7 of the Complaint are denied and defendants aver that the referenced letters, copies of which are attached as "A", "B", "C", "D", and "DE", speak for themselves as to their substance.

5. The allegations contained in the first sentence of paragraph 8 of the Complaint are denied and defendants aver that the referenced letter, a copy of which is attached as "D" speaks for itself as to its substance. The allegations contained in the second sentence of said paragraph are admitted and defendants assert that said possession by [Government Agency] was pursuant to a lawful grand jury subpoena. The allegations contained in the third sentence of said paragraph are denied.

6. The allegations contained in paragraphs 9, 10 and the first three sentences of paragraph 11 of the Complaint are denied and defendants aver that the referenced letters, copies of which are attached as "G", "H", "I" and "J", speak for themselves as to their substance. The allegations contained in the fourth sentence of paragraph 11 of the Complaint is denied.

7. The allegations contained in the first sentence of paragraph 12 of the Complaint are denied. The allegations contained in the second sentence of said paragraph constitute conclusions of law to which no answer is required. If a response is necessary, the allegations contained therein are denied.

8. The allegations contained in paragraph 13 of the Complaint are denied.

9. Any paragraph of the Complaint not specifically answered and to which an answer may be required is denied.

FIRST AFFIRMATIVE DEFENSE

10. The Complaint fails to state a claim upon which relief may be granted.

SECOND AFFIRMATIVE DEFENSE

11. This Court lacks subject matter jurisdiction over this action.

THIRD AFFIRMATIVE DEFENSE

12. The documents sought are exempt from disclosure under 5 U.S.C. § 552(b)(3).

FOURTH AFFIRMATIVE DEFENSE

13. The documents sought are exempt from disclosure under 5 U.S.C. § 552(b)(5).

FIFTH AFFIRMATIVE DEFENSE

14. The documents sought are exempt from disclosure under 5 U.S.C. § 552(b)(7).

SIXTH AFFIRMATIVE DEFENSE

15. The documents sought are prohibited from being disclosed pursuant to Fed.R. Crim.P. (6)(e).

SEVENTH AFFIRMATIVE DEFENSE

16. Plaintiff is not entitled to attorneys fees under the circumstances of this action.

WHEREFORE, it is respectfully requested that the Court dismiss this action against defendants and grant defendants its cost, attorneys fees and other relief it may deem just and proper.

Dated: Brooklyn, New York
September 10, 1987

ANDREW J. MALONEY
United States Attorney
Eastern District of New York
Attorney for Defendant
225 Cadman Plaza East
Brooklyn, New York 11201

By: /s/ CHARLES E. KNAPP
CHARLES E. KNAPP
Assistant U.S. Attorney
(718) 330-2898/7100

TO: FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON
One New York Plaza
New York, New York 10004
Att: Richard M. Michaelson, Esq.

[Attachment A]

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
SUITE 800
1001 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004-2505
(202) 639-7000

LYDIA H. SUFFLING
(202) 639-7066

September 30, 1986

Ms. [Jane Doe]
[John Doe Agency]
[address omitted]

Re: Freedom of Information Act Request

Dear Ms. [Doe]:

Pursuant to the Freedom of Information Act and implementing regulations, [John Doe Corporation], through undersigned counsel, requests copies of the following records. For the purposes of this request, ["Agency"] includes, without limitation, any office, division, officer, employee, agent or representative of [John Doe Agency].

This request covers any and all documents, communications, correspondence, reports, work papers, telegrams, records of conversations or meetings or conferences or interviews, memoranda, books of original entry, graphs, charts, diagrams, reports or summaries of investigations, negotiations, statistical analyses, ledgers, audits, schedules, or other writings of whatever description, that are related in any way to the subject matter of the correspondence between [John Doe Agency] and [John Doe Corporation] dated May 2,

1978 and July 11, 1978, respectively. Copies of the letters referred to are attached for your convenience.

As you know, the Freedom of Information Act, as amended, provides that, if any parts of a file or record are exempt from disclosure,, "reasonably segregable" portions must be released. Therefore, we request that, if you determine any portions of the requested records to be exempt from disclosure, we be provided with all records or portions thereof which are not so exempt and with a detailed list and description of all records or portions thereof for which an exemption is claimed and a discussion of why those records or portions of records fall within an exemption. *See Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 414 U.S. 977 (1974); *Mead Data Central, Inc.* v. *Department of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977):

> [W]hen an agency seeks to withhold information it must provide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.

Accord, e.g., Coastal States Gas Corp. v. *Department of Energy*, 617 F.2d 854 (D.C. Cir. 1980).

With respect to information which you may deem to fall within Exemption 4, such material may be released to [John Doe Corporation] because there is no likelihood of substantial competitive harm in releasing [John Doe Corporation's] own materials to [John Doe Corporation] itself.

We ask that copies of the requested materials be furnished us as soon as individual items are available, and that your response to this request not await a compilation of all the materials requested. We are, of course, prepared to pay whatever sums may lawfully be required for compliance with this request.

Please call the undersigned at 639-7066 if you have any questions or require additional information in order to expedite location of the records. Your prompt compliance with this request will be most appreciated.

Respectfully submitted,

/s/ LYDIA H. SUFFLING

FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON
Lydia H. Suffling
Counsel to [John Doe Corporation]

[Attachment B]

[JOHN DOE AGENCY]
BOSTON REGION
Resident Audit Office
[John Doe Corporation], Plant 30
[address omitted]

IN REPLY REFER TO: **KG:mag**
2441 May 2, 1978

Mr. [John Doe], Assistant Treasurer
[John Doe Corporation]
Plant 30
[address omitted]

Dear Mr. [Doe]:

Our office considers the [John Doe Corporation (Corporation)] accounting system to be deficient in that costs that should be charged directly to contracts are being recovered through [Corporation] overhead.

It was estimated that at least $4.7 million of 1977 costs charged to [Corporation] overhead account No. 051 are identifiable to [Corporation] Programs/Projects. This is in violation of ASPR 15-203.

Accordingly, we recommend that a voluntary accounting change be instituted to correct the deficiency. This change should be made in accordance with ASPR 7-104.83(a)(4)(B), at the earliest mutually agreeable date.

Your prompt attention and reply is appreciated.

Sincerely,

[JOHN DOE]
Resident Auditor

[Attachment C]

[JOHN DOE CORPORATION] **ACC No. 11-778**
July 11, 1978

Mr. [John Doe]
[John Doe Agency]
[John Doe Corporation]
[address omitted]

Reference: [Agency] letter 2441 dated May 2, 1978
Dear Mr. [Doe]:

This is in response to your letter of May 2, 1978 concerning the manner in which [John Doe Corporation (Corporation)] accounts for the costs of technical and scientific computer services provided by [a subsidiary of Corporation]. In considering your recommendation, we acknowledge that the concept of charging computer services directly to contracts may be acceptable under certain circumstances. It has been examined several times by [Corporation] and has been discussed with [Agency and another agency] over a number of years. In reexamining this matter, therefore, it may be useful to review the logic which impelled the original decision to charge [the subsidiary's] computer service costs to [Corporation] overhead expenses.

Prior to January 1, 1970, Computing Services functioned as an operating department of [Corporation]. As such, the costs associated with the computing function were characteristically treated as overhead. Owned equipment was capitalized and depreciated, lease and maintenance costs were charged to overhead as were the personnel (salary and fringe) costs associated with the operation of the equipment. In short, except for personnel providing specific deliverable

software and items, the cost of the computer function was charged to overhead and allocated to all contracts on an equitable basis.

On January 1, 1970, [the subsidary] was formed as an affiliate and the ownership and rental agreements of all general purpose equipment, including mainframe computers, keypunch and other peripheral equipment, were transfered from [Corporation] to [the subsidary]. At the same time, all Computing Systems Department personnel became employees of [the subsidiary]. In effect, [Corporation's] internal overhead expenses were replaced by an inter-company billing from [the subsidiary] for a continuing overhead expense. Thus, the decision to charge computer costs as overhead expense centered around the indirect nature of these costs together with the desire to maintain costing in a manner consistent with previous proposals. [Agency and another agency] supported this treatment at that time.

The nature of these computing costs has not changed from the time of the initiation of [the subsidiary], and the Contractor does not concur with the Resident Auditor's opinion that its accounting system is deficient, nor in violation of ASPR 15-202, -203, as to its treatment of computer costs.

ASPR Section 15-202 Direct Cost, Part (a), provides that, "A direct cost is any cost which can be identified *specifically* with a particular final cost objective." The information upon which the Resident Auditor has based his opinion about direct charging computer services was supplied to [Agency] at [Agency] request. It

was compiled subsequent to incurrence with considerable effort and was clearly described as an *estimate* of [the subsidiary's] computing service costs identifiable to [Corporation] *programs* (*not* a *contract* or line item thereof). It was qualified as it was because the Contractor does not now have, never has had, and never before has been required to develop, a system which would enable identification of such costs specifically with a final cost objective. In this regard, it should be borne in mind that at any given point in time [Corporation] may have four to five hundred active contracts with direct charge potential to 40,000 job/primary structures. An awesome statistic when viewed in the sense of accounting for computer costs in an environment of manoseconds (billionth of a second).

Identification to a final cost objective is further impeded by the impracticability of separating the costs of engineering problem solutions by aircraft, support, derivatives, etc. Since many of the computer program services have application, relevance or benefit to a number of cost objectives, additional support is provided for the existing practice by ASPR 15-203 and by the proposed Cost Accounting Standard (CAS) 417. ASPR 15-203 Indirect Cost, Part (a), defines such a cost as, "one which, because of its incurrence for common or joint objectives, is not readily subject to treatment as a direct cost," while proposed CAS 417, in part, states that, "A cost shall be accounted for as a direct cost and be allocated only to the final cost objective with which it is identified if:

1) the beneficial or causal relationship between the incurrence of the cost and the final cost objective is *clear and exclusive*, and,

2) the amount of the cost . . . is *readily and economically measurable* without undue administrative effort . . ."

The array of computer costs are "not readily and economically measurable as a direct charge without undue administrative effort; . . ." and the relationship of the cost to a final cost objective is usually not "clear and exclusive."

It should also be remembered that CAS 401 requires that each contractor's practices used in estimating costs for a proposal must be consistent with cost accounting practices used by him in accumulating and reporting costs. It would be extremely difficult, if not impossible, to estimate the extent of computer usage to a contract and line item level for forward pricing purposes as required by that standard. In our multi-program, multi-contract environment, it would be necessary to forecast one, two and three years hence, the level of computer access that may be required for a particular contract. Such a situation would be akin to an unknown unknown. Who will need computer access, for how long, to solve what problem?

The Contractor firmly believes that his method of charging [subsidiary] computer service costs conforms with ASPR and CAS and is consistent with the multi-cost objective function served. Nevertheless, we do not suggest that it would be impossible to devise a system to identify computer usage on a direct charge basis.

The real question is whether such a system can *cost effectively* be developed and implemented. [Corporation] business activity, now and for the foreseeable future, involves military products almost exclusively, and whether a cost is charged directly or indirectly has little bearing on "the bottom line." The total cost is the same. The cost of developing and implementing such a system is another matter. It has been estimated that the cost of a direct charge system would exceed $1,000,000. This, coupled with the recurring cost of proposing, negotiating and recording such costs, would represent a delta increase, chargeable to government contracts. Such a method would not be an improvement on present practices and we can see no significant benefit to be derived from this additional cost and complexity. In this regard, the Contractor notes that CAS 331.50 was revised on March 10, 1978 (ASPR must be conformed) as that if the change were agreed to it would be accomplished under the provisions of CAS 331.50(a)(C) and would require an equitable adjustment rather than under the provisions of CAS 331.50(a)(4)(B) as suggested by the Resident Auditor.

The "indirect" cost of such implementation might be even more staggering. Future proposals would have to be prepared on some "level of effort" basis. Negotiations would be drawn out by the involvement of each procurement contracting officer in a discussion of an estimate of future computing service requirements. Each program would insist on a generous allowance for these services for its own protection—the parts would exceed the whole. Additional effort and personnel would be required to prepare, evaluate and negotiate

the estimates. Program, Contracts and Government personnel representing each major product together with CSPD and [subsidiary] personnel would be deeply involved where such efforts are now conducted in an uncomplicated manner.

For the reasons cited above, the Contractor does not believe the recommended change in accounting would be in its, nor the Government's, best interest at this time, and ask that you reconsider your recommendation in light of this information. Should you wish, we will be available to meet with you to discuss any questions concerning this information and/or meaningful alternatives in arriving at a resolution of this matter.

Very truly yours,

[JOHN DOE CORPORATION]

[John Doe]
Assistant Treasurer

[Attachment D]

[JOHN DOE AGENCY]

BOSTON REGION

[address omitted]

IN REPLY REFER TO

RC-2
502.5
I-86-207-H/B

November 18, 1986

Ms. Lydia H. Suffling
Fried, Frank, Harris, Shriver & Jacobson
Suite 800
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2505

Dear Ms. Suffling:

This is to inform you that your request under the Freedom of Information Act for any and all documents related to the correspondence between [Agency] and [John Doe Corporation] dated May 2, 1978 and July 11, 1978, is denied.

Upon the advice and direction of Dennis E. Milton, Assistant U.S. Attorney, Eastern District of New York, the documents for which your request is based are not available for disclosure under sections 552(b)(7)(A) and (E) of the Freedom of Information Act.

You may appeal the denial of the requested information pursuant to the Freedom of Information Act, 5 U.S.C. 522. Your appeal must be submitted within 45 working days upon receipt of this letter to:

Mr. [John Doe]
Assistant Director, Resources
[John Doe Agency]
[address omitted]

Sincerely,

[JOHN DOE]
Regional Director

[Attachment E]

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
SUITE 800
1001 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004-2505
(202) 639-7000

MIRA N. MARSHALL
(202) 639-7059

January 15, 1987

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

[John Doe]
Assistant Director, Resources
[John Doe Agency]
[address omitted]

Re: Freedom of Information Act Appeal

Dear Mr. [Doe]:

Pursuant to the Freedom of Information Act (FOIA) and its implementing regulations, and in accordance with written instructions provided by the Boston Region of [John Doe Agency], [John Doe Corporation (Corporation)], through undersigned counsel, appeals the denial of its FOIA request by the Boston Regional Director of [Agency] in a letter dated November 18, 1986.

I. BACKGROUND

The instant FOIA appeal concerns [Agency] records "that are related in any way to the subject matter of the

correspondence between [Agency] and [John Doe Corporation] dated May 2, 1978 and July 11, 1978" (FOIA Request dated September 30, 1986, Exhibit A). The letters underlying [Corporation's] FOIA request are over eight years old and relate to charges for a Software Development Facility.

The May 2, 1978 [Agency] letter recommended a voluntary accounting change in order to charge certain 1977 Software Development Facility costs directly to [Corporation] Programs/Projects, instead of to [Corporation] technical overhead account 051. The [Agency] letter followed a March 1978 NAVPRO analysis of the 051 account which, among other things, questioned the practice of charging the Software Development Facility to the 051 account, rather than directly to A-6E WST and NEWTS contracts (Nos. N6 1339-75-C-0030 and N6-1339-76-C-0049, respectively).

The [Corporation] response of July 11, 1978, provided a detailed justification for the charges and requested reconsideration by [Agency] of its recommended accounting change. (Both letters are appended to Exhibit A). No further correspondence was thereafter received from [Agency] with regard to this matter.

[Corporation's] September, 1986 FOIA request was forwarded by [Agency] headquarters to the Boston Region. Fully 35 days after [Corporation's] FOIA request, the Boston Regional Director responded by letter and stated that "since [the letters were] written more than eight years ago, we estimate that an additional ten work days is necessary to collect and evaluate

the documents involved." (Letter by [John Doe], Boston Regional Director, [Agency], to Lydia H. Suffling, [Corporation] Counsel, dated November 4, 1986; Exhibit B).

By a letter dated November 13, 1986, the Boston Regional Director denied [Corporation's] FOIA request. (FOIA Denial by [John Doe] to Lydia Suffling, dated November 18, 1986, Exhibit C). Despite [Corporation's] express request for segregable non-exempt records, a detailed list of documents for which exemption is claimed, and a detailed justification for each document withheld, *see Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 414 U.S. 977 (1974); *Mead Data Central, Inc. v. Department of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977), [Agency's] entire substantive response to the request consisted of one sentence, which read: "Upon the advice and direction of Dennis E. Milton, Assistant U.S. Attorney, Eastern District of New York, the documents for which your request is based are not available for disclosure under sections 552(b)(7)(A) and (E) of the Freedom of Information Act."

Dennis E. Milton is an Assistant U.S. Attorney in charge of a federal grand jury investigation of alleged mischarging of A-6E WST and NEWTS contract costs to [Corporation's] Software Development Facility. The letters underlying [Corporation's] FOIA request were provided to the grand jury in response to a series of subpoenas, the first of which was dated February 19, 1986.

Given the brevity of the FOIA denial and the relatively recent vintage of the grand jury investigation, it is apparent that the [Agency] records which relate to the substance of the letters of 1978 were compiled long before any law enforcement proceeding was underway or even considered. Moreover, the 1978 letters were exchanged incident to a routine audit, and neither [Agency], nor any other agency of the Government, has questioned [Corporation's] 1978 justification of its charging practices. There is no legitimate reason for withholding such [Agency] records under any FOIA exemption.

II. The Withheld Material Was Not Compiled For Law Enforcement Purposes

The Boston Region relies on FOIA Exemptions 7(A) and (E), 5 U.S.C. § 552(b)(7)(A) and (E), as justification for withholding DCAA records responsive to Grumman's FOIA request. In pertinent part, the claimed exemption reads:

> (b) This section [5 U.S.C. § 552] does not apply to matters that are—
>
> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings (or)
>
> . . . (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law. . .

Anti-Drug Abuse Act of 1986, P.L. 99-570, § 1802, 1986 U.S. CODE CONG. & AD. NEWS (Supp. 10A 1986) (to be codified at 5 U.S.C. § 552(b)(7)).

The recent revision of exemption 7 preserves "the threshold question of whether 'records or information' withheld under (b)(7) are 'compiled for law enforcement purposes.' This standard [will] still have to be satisfied in order to claim the protection of the (b)(7) exemption." SEN. COMM. ON THE JUDICIARY, REPORT ON S. 774, S. Rept. 98-221, 98th Cong., 1st Sess., 23 (1983), *reprinted in* 132 Cong. Rec. H9465-9466 (daily ed. October 8, 1986) (revisions to exemption 7 proposed in S. 774 incorporated into P.L. 99-570). All federal agencies must meet the threshold requirements of exemption 7 before they may withhold requested documents on the basis of any of its subparts. *Pratt v. Webster*, 673 F.2d 408, 416 (D.C. Cir. 1982) (even the FBI must demonstrate its law enforcement purpose, despite its status as a law enforcement agency).

In *FBI v. Abramson*, 456 U.S. 615 (1982), the Supreme Court held that the "threshold requirement for qualifying under Exemption 7 turns on the purpose for which the document sought to be withheld was prepared. . ." *Id.* at 624. *Abramson* concerned the exempt status of information which was originally compiled for law enforcement purposes, but which later

appeared in abstracted form for non-law enforcement purposes. In reversing the D.C. Circuit's order of disclosure, the Supreme Court held that the *original character* of the requested documents controlled, and it remanded to the D.C. Circuit the question of whether the original documents were prepared for law enforcement purposes.

"The term law enforcement purpose has been construed to require an examination of the agency itself to determine whether [it] may exercise a law enforcement function." *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 748 (D.C. Cir. 1980), citing *Irons v. Bell*, 596 F.2d 468, 474 (1st Cir. 1979).

[Agency] is not a law enforcement agency. Its mission is to **[remainder of paragraph omitted].**

Agency provides advice and information to program administrators. It does not perform law enforcement functions. While it may, upon specific request, assist the Department of Defense Inspector General *** which does have law enforcement investigative functions, that did not occur here. The Department of Defense Inspector General's Office was not created until 1982. The documents at issue in this FOIA request were generated beginning in 1978, and were not compiled at the direction of any law enforcement agency.

The documents were part of routine monitoring by [Agency] of costs incurred under Department of Defense contracts. It was not an "investigation;" there

were no allegations of wrongdoing; and there is no reason to believe that [Agency's] correspondence with [Corporation] triggered any action by a law enforcement agency.

Records compiled for non-law enforcement purposes, such as routine audits, do not meet the threshold of exemption 7 merely because they relate in some way to a later initiated criminal investigation. *Hatcher v. United States Postal Service*, 556 F. Supp. 331, 334-335 (D.D.C. 1982); *Gregory v. Federal Deposit Insurance Corp.*, 470 F. Supp. 1329, 1333-1334 (D.D.C. 1979), *rev'd on other grounds*, 631 F.2d 896 (D.C. Cir. 1980). "Unless the information was originally gathered for law enforcement purposes, the subsequent inclusion of the material in an investigative report does not affect its characterization under exemption 7." *Gregory v. FDIC*, 470 F. Supp. at 1334.

The documents sought by [Corporation] are unusually old, so much so that [Agency] had difficulty finding them. *See* Exhibit B. They were compiled at a time long before the current grand jury investigation, and did not prompt any law enforcement investigation. In sum, it is clear that the requested documents were not "prepared by Government agencies to prosecute law violators," *Rural Housing Alliance v. United States Dept. of Agric.*, 498 F.2d 73, 81 n.45 (D.C. Cir. 1974) (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965)), the *sine qua non* of records compiled for law enforcement purposes.

The courts have distinguished between records compiled as a result of routine monitoring and oversight and those which are compiled as a result of a focused inquiry into alleged wrongdoing, with only the latter being considered "compiled for law enforcement purposes." *Hatcher v. United States Postal Service*, 556 F. Supp. 331 (D.D.C. 1982) (material collected as a part of routine contract administration prior to initiation of investigation found not to be exempt); *Gregory v. FDIC*, 470 F. Supp. 1329 (D.D.C. 1979) (report of criminal irregularity made by FDIC during course of routine bank examination held not exempt); *Rural Housing Alliance v. United States Dept. of Agric.*, 498 F.2d 73 (D.C. Cir. 1974) (report compiled by U.S.D.A. concerning housing discrimination by government employees held non-exempt if compiled for purpose of employee oversight, rather than enforcement action).

In *Rural Housing Alliance*, the court explained the *reductio ad absurdum* that would occur if exemption 7 applied to routine personnel oversight documents.

> On its face, exemption 7's language appears broad enough to include all such internal audits. If this broad approach is accepted, however, we immediately encounter the problem that most information sought by the Government about its own operations is for the purpose ultimately of determining whether such operations comport with applicable law, and thus is "for law enforcement purposes." Any internal auditing or monitoring conceivably

> could result in disciplinary action, in dismissal, or indeed in criminal charges against the employees. But if this broad interpretation is correct, then the exemption swallows up theg Act. . .

493 F.2d at 81. This rationale applies with equal force to routine contract administration documents compiled by [Agency].

III. Disclosure of the Withheld Material Will Not Interfere With Law Enforcement Proceedings

Even if one were to presume against all probability that the withheld material was compiled for law enforcement purposes, the Government still bears the burden of proof in establishing that disclosure of the withheld materials will result in one or more of the six harms identified in Exemption 7. *See Cohen v. Environmental Protection Agency*, 575 F. Supp. 425, 427-428 (D.D.C. 1983); *cf. Lykins v. United States Department of Justice*, 725 F.2d 1455, 1462-1463 (D.C. Cir. 1984) (government bears full burden of proof).

The blanket denial of [Corporation's] FOIA request does not even evince an attempt to explain how follow-up documents to the 1978 letters "could reasonably be expected to interfere with law enforcement proceedings." 5 U.S.C. § 552(b)(7)(A) (Exemption A). No attempt was made to reveal when the documents were compiled, who the interested parties were, or what harm would result from their being made public. "Bare conclusory allegations" of potential interference with law enforcement proceedings do not suffice under any

circumstances to justify withholding of documents under Exemption 7. *Irons v. Bell*, 596 F.2d at 471 (*see Lykins*, 725 F.2d at 1463).

IV. Disclosure Of The Withheld Material Will Not Reveal Techniques And Procedures For Law Enforcement Investigations Or Prosecutions In A Manner That Would Risk Circumvention Of The Law

FOIA exemption 7(e) protects from disclosure documents that would reveal "techniques and procedures for law enforcement investigations of prosecutions if such disclosure reasonably could be expected to risk circumvention of the law." No showing has been made of how the documents at issue could, even if found to be compiled for a law enforcement purpose, reveal law enforcement procedures or risk circumvention of the law.

There is no secret to [Agency's] method of operation. It uses standard accounting and auditing techniques, and follows the [Agency] Manual, most of which is already public.

It is more likely that the requested records are analogous to the memoranda at issue in *Coastal States Gas Corp. v. Dept. of Energy*, 617 F.2d 854 (D.C. Cir. 1980). Those memoranda provided legal advice from DOE Regional Counsels to DOE compliance auditors about the application of DOE regulations in specific factual situations. The court ordered the memoranda released, holding there was no support for an Exemption 7 claim.

No showing had been made by DOE of how release of the documents would have interfered with or impeded a current investigation or proceeding, or how release might have "tip[ped] the Government's hand", *id.* at 870, as to its evidence or approach.

We expect that the documents responsive to this request primarily involve a discussion of the proper accounting for the particular charges here at issue. A decision, or even a non-decision, is the equivalent of *Coastal States* memoranda. Release of such decisions to the public serves to prevent "secret law" from being made. *See Cuneo v. Schlesinger*, 484 F.2d 1086, 1090 (D.C. Cir. 1973) (public had right to disclosure of portions of DCAA audit manual that constituted secret law).

None of the harms that Congress was concerned about when it enacted this exemption are likely to occur if the requested documents are released. Documents having to do with a single accounting issue some eight years ago could not conceivably disclose the "scope, direction, and focus of the [current] inquiry," *Campbell v. Dept. of Health and Human Services*, 682 F.2d 256, 260 (D.C. Cir. 1982), which, in any event, is already known. The grand jury proceedings cannot properly be used as a pretext for withholding whatever records [Agency] generated in connection with its 1978 audit of [Corporation's] charging practices.

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON
[John Doe]
January 15, 1987

V. Conclusion

[Corporation] assumes that [Agency] determined some eight years ago that the accounting change suggested in the Resident Auditor's letter of May 2, 1978 was unwarranted since it is apparent that [Agency] would have pursued the matter if it had not been persuaded by [Corporation's] response. Under these circumstances, the only reason the documents are being withheld is that they are favorable to [Corporation's] position. This is not a valid or permissible reason under the FOIA or otherwise for refusing to disclose agency records.

Respectfully submitted,

/s/ MIRA N. MARSHALL
Mira N. Marshall

/s/ LYDIA H. SUFFLING/SR
Lydia H. Suffling

FRIED, FRANK, HARRIS,
SHRIVER & JACOBSON
1001 Pennsylvania Avenue, NW
Suite 800
Washington, D.C. 20004
(202) 639-7000
Counsel to [John Doe Corporation]

[Attachment F]

[JOHN DOE AGENCY]
[address omitted]

IN REPLY REFER TO

CMR 502.5
A-87-017-H

18 February 1987

Ms. Mira N. Marshall
Fried, Frank, Harris, Shriver & Jacobson
Suite 800
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2505

Dear Ms. Marshall:

This is in response to your letter dated 15 January 1987, in which you appeal the denial of records pertaining to [John Doe Corporation] which had been the subject of your 30 September 1986 Freedom of Information Act request.

The records you are seeking are under the control of the Department of Justice and physically in the possession of [John Doe Government Agency]. Therefore, your request has been referred to the cognizant Assistant United States Attorney for action and direct reply to you. Enclosed is a copy of the referral letter.

Should you have any questions pertaining to your letter, please contact Sharon Heitman on 274-4400.

Sincerely,

[John Doe]
Assistant Director, Resources

Encl
[Agency] ltr to Mr. Dennis
Milton, AUSA w/o encls

[JOHN DOE AGENCY]
[address omitted]

IN REPLY REFER TO

CMR 502.5
A-87-017-H

18 February 1987

Mr. Dennis E. Milton
United States Court House
225 Cadman Plaza East
Brooklyn, NY 11201

Dear Mr. Milton:

The enclosed Freedom of Information Act (FOIA) appeal from Fried, Frank, Harris, Shriver & Jacobson, dated 15 January 1987, for documents pertaining to the [John Doe Corporation] is referred to you for necessary action and a direct response to the requester.

As you will recall, you requested in writing that these documents be denied under 5 USC 552(b)(7)(A) and (E). Since the documents are now in your possession, it is requested that you review the information and make a release determination.

Once you have made a determination on the releasability of these documents, please furnish me with a copy of your final determination.

Should you have any questions concerning this matter, please contact [name and telephone number omitted].

Sincerely,

[John Doe]
Assistant Director, Resources

Encls 4

1. [Agency] ltr to Fried, Frank, Harris, Shriver & Jacobson
2. FOIA Request from Fried, Frank, Harris, Shriver & Jacobson, 9/30/86
3. FOIA Appeal from Fried, Frank, Harris, Shriver & Jacobson, 1/15/87
4. Your letter to Mr. [Doe], 11/10/86

[Attachment G]

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
SUITE 800
1001 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004-2505
(202) 639-7000

MIRA N. MARSHALL
(202) 639-7059

February 3, 1987

VIA HAND DELIVERY
FOIPA
[John Doe Government Agency]
[address omitted]

Re: Freedom of Information Act Request

Dear Sir:

Pursuant to the Freedom of Information Act and implementing regulations, [John Doe Corporation], through undersigned counsel, requests copies of the following records. For the purposes of this request, ["Agency"] or ["Government Agency"] includes, without limitation, any office, division, officer, employee, agent or representative of [John Doe Agency] or [John Doe Government Agency].

We request all documents that are related in any way to the subject matter of the correspondence between [Agency] and [John Doe Corporation] dated May 2, 1978 and July 11, 1978, respectively, and are in the possession of [Government Agency] at either a Field Office or [Government Agency] Headquarters in

Washington, D.C. Copies of the letters referred to are attached for your convenience.

We have been informed that two file folders of documents responsive to this request were removed from [Agency] Field Audit Office by [John Doe and John Doe of the Government Agency office in New York], and remain in their custody. These documents were generated in the course of routine [Agency] contract administration some eight years ago, and are not the product of a law enforcement investigation or proceeding. Under these circumstances, there is no basis for either [Government Agency] or [Agency] to withhold the requested records.

[Agency] has not provided a substantive reason for withholding these documents. If [Government Agency] is unwilling to release the requested documents directly to [Corporation], it should at least return the documents, or copies, to [Agency] so it may make an appropriate substantive determination regarding releasability, to which [Government Agency] may defer. We understand this is common practice.

We request that, if you determine any portions of the requested records to be exempt from disclosure, we be provided with all records or portions thereof which are not so exempt and with a detailed list and description of all records or portions thereof for which an exemption is claimed and a discussion of why those records or portions of records fall within an exemption.

We ask that copies of the requested materials be furnished us as soon as individual items are available, and that your response to this request not await a

compilation of all the materials requested. We are, of course, prepared to pay whatever sums may lawfully be required for compliance with this request.

Please call the undersigned at 639-7059 if you have any questions or require any additional information in order to expedite location of the records. Your prompt compliance with this request will be most appreciated.

Respectfully submitted,
FRIED, FRANK, HARRIS, SHRIVER & JACOBSON

/s/
Mira N. Marshall
Counsel to [John Doe Corporation]

[Attachment H]

[JOHN DOE GOVERNMENT AGENCY]
[address omitted]

Ms. Mira N. Marshall
Fried, Frank, Harris, Shriver & Jacobson
Suite 800
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

June 9, 1987

Re: [John Doe Corporation];
FOIPA Matter

Dear Ms. Marshall:

I am writing in response to your Freedom of Information Act (FOIA) request which was referred to this office by [Government Agency Headquarters] in Washington, D.C. on 6/1/87.

Pursuant to your request a review of the indices to the Central Records System of the New York Office (NYO) of [Government Agency] was conducted. This review, in conjunction with a consultation with [John Doe] of the NYO located the materials to which you are seeking access.

However, none of these materials are being released to you at this time in order to protect that information which is exempt from disclosure pursuant to the following subsection of Title 5, United States Code, Section 552:

> b(7)(A) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or

information could reasonably be expected to interfere with enforcement proceedings.

You may appeal this denial by writing to the Assistant Attorney General, Office of Legal Policy, (Attn: Office of Information and Privacy), United States Department of Justice, Washington, D.C. 20530, within thirty days of receipt of this letter. The envelope and letter should be clearly marked "Freedom of Information Appeal" or "Information Appeal". In addition, please cite the name of the office to which your original request was directed.

Very Truly Yours,

[John Doe]
Assistant Director In Charge

[By: John Doe]
Principal Legal Advisor

[Attachment I]

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
SUITE 800
1001 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004-2505
(202) 639-7000

MIRA N. MARSHALL
(202) 639-7066

June 15, 1987

VIA HAND DELIVERY

Assistant Attorney General
Office of Legal Policy
U.S. Department of Justice
Tenth & Pennsylvania Ave., NW
Washington, D.C. 20530

ATTENTION: Office of Information and Privacy

Re: Appeal of [John Doe Government Agency]
Denial of Freedom of Information Act
Request No. 280,815

Dear Sir:

We hereby appeal the denial of our Freedom of Information Act (FOIA) request on behalf of [John Doe Corporation]. We filed this request with [John Doe Government Agency Headquarters] on February 4, 1987 (copy attached as Exhibit A) after [John Doe Agency (Agency)] informed us the requested records were no longer in its possession (see letter attached as Exhibit B), but were being held by agents of [John Doe Government Agency (Government Agency)] in New

York. [Government Agency Headquarters] in turn referred the request to the [Government Agency] New York Office on June 1, 1987 (see letter attached as Exhibit C).

The New York Office denied the request, in toto, in a letter dated June 9, 1987, signed by [John Doe], the Principal Legal Advisor (copy attached as Exhibit D). [Government Agency] claims that the requested records are exempt from production pursuant to 5 U.S.C. Section 552(b)(7)(A)—records or information compiled for law enforcement purposes, but only to the extent production . . . could reasonably be expected to interfere with enforcement proceedings.

We find this claim of exemption to be completely insupportable. The requested documents concern correspondence over eight years old, incident to a routine audit by [Agency]. A routine audit is not a law enforcement activity under the FOIA; these records therefore do not meet the threshold criteria for withholding under exemption (b)(7)(A). For a complete discussion of the caselaw relative to our appeal, please review our letter to [Agency] appealing its refusal to produce these same documents (attached as Exhibit E). This appeal of the withholding by [Government Agency] is made for the same reasons stated in the [Agency] appeal, which is incorporated herein by reference.

We look forward to receiving your ruling within the 20 working days provided by the FOIA.

Sincerely,

/s/ JOHN T. BOESE
John T. Boese

/s/ MIRA N. MARSHALL
Mira N. Marshall

Attachments

[Attachment J]

June 22, 1987

Mira N. Marshall, Esquire
Fried, Frank, Harris, Shriver
& Jacobson
Suite 800
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2505

Re: [John Doe Corporation], New York F.O.

Dear Ms. Marshall:

This is to advise you that your administrative appeal from the action by [John Doe Government Agency] on your request for information from the files of the Department of Justice was received by this Office on June 17, 1987.

The Office of Legal Policy, which has the responsibility of adjudicating such appeals, has a substantial backlog of pending appeals received prior to yours. In an attempt to afford each appellant equal and impartial treatment, we have adopted a general practice of assigning appeals in the approximate order of receipt. Your appeal has been assigned number 87-0953. Please mention this number in any future correspondence to this Office regarding this matter.

We will notify you of the decision on your appeal as soon as we can. The necessity of this delay is regretted and your continuing courtesy is appreciated.

Sincerely,

Carolyn D. Poindexter,
Paralegal Specialist
Office of Information and Privacy

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK
LONG ISLAND DIVISION

Civil Action No. CV-87-2520
(Judge Mishler)

[JOHN DOE CORPORATION]

PLAINTIFF,

v.

[JOHN DOE AGENCY]

and

[JOHN DOE GOVERNMENT AGENCY]

DEFENDANTS.

PLAINTIFF [JOHN DOE CORPORATION'S] FIRST SET OF INTERROGATORIES TO DEFENDANTS [JOHN DOE AGENCY] AND [JOHN DOE GOVERNMENT AGENCY]

Plaintiff [John Doe Corporation ("John Doe")] pursuant to Fed. R. Civ. P. 33, requests defendants [John Doe Agency] and [John Doe Government Agency] to answer under oath the following interrogatories within 30 days from the date of service hereof.

DEFINITIONS AND INSTRUCTIONS

A. ["Agency"] means defendant [John Doe Agency], and where appropriate in the context, any or all of its offices, divisions, officers, employees, agents or representatives.

B. ["Government Agency"] means defendant [John Doe Government Agency], and where appropriate in the context, any or all of its offices, divisions, officers, employees, agents or representatives.

C. "Identify" with regard to a person means to state such person's full name, current residence address and phone number; current business address and phone number; current business address and phone number and, if such person was an employee, agent, or representative of the United States government between May, 1978 and the present, all positions held since May, 1978 to the present. To the extent current addresses and phone numbers are not known, then state last known addresses and telephone numbers.

D. "Identify" with regard to a record, document or communication means state its exact title or other means of specifying it, and such other informtion as is necessary to locate and define such document for production, including but not limited to a summary of its contents, the date of its making, preparation, execution, receipt, recording, filing and/or transcription, the present or last-known location of such document (stating the latest date at which you know this to have been the location of such document), and identify all persons who made, executed, received, recorded, filed, transcribed and/or now have custody of such document and their relationship, if any, to you.

E. "Records" means any and all documents, communications, correspondence, reports, work papers, telegrams, records of conversations or meetings or conferences or interviews, memoranda, books of original entry, graphs, charts, diagrams, reports or summaries of investigations, negotiations, statistical analyses,

ledgers, audits, schedules, or other writings of whatever description.

F. "Records at issue" means those records responsive to [John Doe] Freedom of Information Act ("FOIA") request to [Agency] dated September 30, 1986.

G. The interrogatories are continuing in nature and, in the event that [Agency] or [Government Agency] obtains additional information, oral or written, between the time of the answer and the trial, shall be supplemented in accordance with Fed. R. Civ. P. 26(e).

H. If objection is taken to any of the following interrogatories, or if any interrogatory is otherwise not answered in full, state the specific grounds therefor and answer the interrogatory to the extent it is not objected to. If any information responsive to any of the following interrogatories is withheld under a claim of privilege or work product, describe or identify the information withheld and the grounds on which it is withheld and the reason it is allegedly privileged.

INTERROGATORIES

1. Identify the date of making, preparation, execution, receipt, recording, filing and/or transcription of each record at issue.

2. Identify the person or persons who prepared each record at issue.

3. Identify how many copies of each record at issue were made, identify to whom each such copy was to be distributed, and identify to whom each copy actually was delivered.

4. State on what date the records at issue were transferred from [Agency] to [Government Agency].

5. State whether a transmittal record from [Agency] to [Government Agency] accompanied the records at issue, and if so identify such record.

6. State whether all of the records at issue and all of the copies thereof were transferred from [Agency] to [Government Agency].

7. Describe the search undertaken in response to [John Doe] FOIA request of September 30, 1986, including the search for copies of all responsive documents, and identify the persons who performed the search.

8. Describe what action or actions, if any, was taken by [Agency], on the basis of, or in response to, the contents of the records at issue.

9. Describe what action or actions, if any, was taken by any other government agency on the basis of, or in response to, the contents of the records at issue.

10. State the date of the grand jury subpoena referred to in paragraphs 3 and 5 of the Answer filed in this action.

11. State the date on which the records at issue were in fact transferred to the grand jury referred to in paragraphs 3 and 5 of the Answer filed in this action.

12. Did [Agency] have in its possession between September 30, 1986 and November 18, 1986, the original (or copy) of any of the records at issue? If the answer is "yes," identify the person or office that possessed them.

13. Explain in detail the reasons why the [Agency] Regional Director did not deny in his November 18, 1986 letter (Attachment to Answer) that the documents were in the possession of the [Agency] on that date.

Respectfully submitted,

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON
(A Partnership Including Professional Corporations)

By: JOHN T. BOESE
John T. Boese
Mira N. Marshall
One New York Plaza
New York, New York 10004
(212) 820-8000

and

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON
(A Partnership Including Professional Corporations)
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 639-7000

ATTORNEYS FOR PLAINTIFF
[John Doe Corporation]

Dated: 9/28/87

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. CV-87-2520
(Mishler, J.)

[JOHN DOE CORPORATION]

PLAINTIFF,

against

[JOHN DOE AGENCY,
JOHN DOE GOVERNMENT AGENCY],

DEFENDANTS.

DECLARATION

SEAN O'SHEA declares, upon penalties of perjury, that:

1. I am an Assistant United States Attorney for the Eastern District of New York, and I make this declaration in support of defendants' motion for a protective order.

2. I am currently assigned to an investigation of mischarging on certain defense contracts which commenced in February 1986.

3. [John Doe Corporation (Corporation)] is the subject of that investigation.

4. A grand jury has been empanelled and has been hearing evidence connected with the aforementioned [Corporation] investigation.

5. The documents at issue in the above-captioned action had been removed from the custody of [John Doe Agency (Agency)] by agents of [John Doe Govern-

ment Agency (Government Agency)] for the purpose of presenting these documents to the grand jury.

6. I have been advised that the requested documents were taken by [Government Agency] prior to [Corporation's] original Freedom of Information Act request to [Agency].

7. All of the requested documents have been presented to the grand jury.

8. These documents, compiled by [Agency], concern the review and analysis by [Agency] of [Corporation's] charging practices on certain defense contracts, and thus pertain directly to the subject matter of the grand jury's investigation.

9. Release of these documents at this time to the subject of the grand jury's investigation might reveal, among other matters, the identities of witnesses and the strategy or direction taken in its investigation thereby risking impeding that investigation.

10. These documents are items which would not be available to [Corporation] at this time under the discovery provisions of the Federal Rules of Criminal Procedure.

Dated: Brooklyn, New York
October 19, 1987

/s/ SEAN O'SHEA

SEAN O'SHEA
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV-87-2520

[JOHN DOE CORPORATION],

PLAINTIFF,

against

[JOHN DOE AGENCY]

and

[JOHN DOE GOVERNMENT AGENCY]

DEFENDANTS.

ORDER

Filed Under Seal December 14, 1987

MISHLER, District Judge

It is hereby ORDERED, that:

1. Defendants ([Agency]/[Government Agency]) shall, within 60 days of the date of this Order, submit to the court for *in camera* examination a *Vaughn* index containing an itemized, indexed inventory of every agency record or portion thereof responsive to plaintiff's FOIA request which the defendants assert to be exempt from disclosure, accompanied by a detailed justification statement covering each refusal to release agency records or any portions thereof, divided into manageable segments and cross-referenced to the itemized inventory as more fully set out below. Defendants are also directed to submit an answer to

plaintiff's interrogatories to the court for *in camera* examination within 60 days.

2. [Agency]/[Government Agency]'s *Vaughn* index shall adequately describe each withheld agency record by providing an analysis of the content in manageable segments. This segment-by-segment analysis of the content of the withheld material shall specify for each withheld agency record of deletion from a released agency record:

(a) the number of pages comprising the agency record and an identification as to its general type (e.g., letter, memorandum, issue paper, etc.);

(b) the full name(s) and job title(s) or position(s) of all author(s), to the extent indicated in the record, and exactly as such name(s) and title(s) or position(s) may appear in each record;

(c) the date of making, preparation, execution, receipt, recording, filing and/or transcription, to the extent indicated in the record;

(d) the full name(s) or job title(s) or position(s) of all addressee(s), to the extent indicated in the record, and exactly as such name(s) or title(s) or position(s) may appear in each record;

(e) the full name(s) of the additional person or persons to whom each agency record was circulated and/or made available, to the extent indicated in the record, and exactly as such name(s) may appear in each record;

(f) the title, subject matter or "re" of each agency record, and the titles or headings of all subdivisions thereof, except insofar as such titles or headings may themselves be asserted to be exempt, in which case [Agency]/[Government

Agency] shall support its assertions of such exemptions in the manner provided in this Order;

(g) a detailed description, set forth in manageable segments, of the entire content of each withheld agency record or deletion from a released agency record;

(h) the full name (and department or division assignment within [Agency]/[Government Agency]) of the person who was the custodian of each agency record at the time it was identified as being responsive to [Corporation's] FOIA request.

3. The [Agency]/[Government Agency] *Vaughn* index shall contain detailed justification statements giving particularized justification for each claim for exemption, which justification statements shall:

(a) specify in detail which parts of each agency record are asserted to be exempt and precisely why, giving reasons rather than conclusions;

(b) be set forth in manageable segments;

(c) be cross-referenced to actual portions of the withheld material;

(d) describe what proportion of the information in each agency record is non-exempt and how that material is dispersed throughout the agency record, addressing specifically whether factual material could be segregated from exempt material and disclosed and if not why not.

4. The defendant's *Vaughn* index shall be contained in one instrument complete in itself and shall be sworn to by the [Agency] or [Government Agency] employee

who is most knowledgeable concerning the preparation of the index and its content.

/s/ JACOB MISHLER
U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 87-2520
[JOHN DOE CORPORATION],

PLAINTIFF,

against

[JOHN DOE AGENCY]
and
[JOHN DOE GOVERNMENT AGENCY],

DEFENDANTS.

MEMORANDUM OF DECISION

Filed Under Seal December 14, 1987

APPEARANCES:

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U.S. Attorney

MISHLER, District Judge

[John Doe Corporation ("Corporation")] has brought this action pursuant to the Freedom of Information Act ("FOIA"), 50 U.S.C. § 552 *et seq.*, seeking production of "all records related to the subject matter of certain correspondence between [John Doe Agency] and [Corporation] dated May 2, 1978 and July 11, 1978 respectively." (Complaint at ¶5).

[Corporation] now moves to compel preparation of an index pursuant to *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977, 94 S. Ct. 1564 (1974). Plaintiff has also served interrogatories on [Agency] and [John Doe Government Agency ("Government Agency")], the defendants in this case.

The defendants cross move for a protective order pursuant to Fed. R. Cir. P. 26(c) to stay the preparation of a *Vaughn* index and an answer to the interrogatories pending the determination of a summary judgment motion which the defendants intend to file.

For the reasons set forth below, the defendants are directed to prepare a *Vaughn* index and to answer the interrogatories and to submit these documents to the court for an *in camera* examination.

DISCUSSION

The Freedom of Information Act was enacted in order to provide a statutory right of public access to documents and records held by federal government agencies. *FBI v. Abramson*, 456 U.S. 615, 102 S. Ct. 2054 (1982). There is a strong public policy in favor of disclosure unless the information is clearly exempt under statutory language. S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965). The burden of proof is on the government agency to establish that the information

sought is subject to one of the exemptions set out in 5 U.S.C. § 552(b). *Brown v. FBI*, 658 F.2d 71, 73 (2d Cir. 1981).

In *Vaughn*, 484 F.2d at 820, the court recognized that the party seeking disclosure of documents can only speculate on their existence, nature and content. "To compensate for this disadvantage courts have required agencies to itemize and index the documents requested, segregate their disclosable and non-disclosable portions and correlate each non-disclosable portion with the FOIA provision which exempts it from disclosure. This procedure is intended to restore the adversarial balance needed to allow the court to reach a just and fair result." (citations omitted). *Brown v. FBI*, 658 F.2d 71, 74 (2d Cir. 1981).

In the action now before the court the defendants opposed disclosing the documents under the FOIA on the basis that the documents are exempt under § 552(b)(7)(A) or (E).[1] The defendants also have cross-moved for a protective order to stay the preparation of a *Vaughn* index and an answer to the interrogatories on the grounds that: (1) the very index and answers themselves are exempt under § 552(b)(E); and (2) they can meet the burden of establishing that the records requested were properly withheld by submitting

[1] During oral argument the government's attorney claimed that the documents qualified under two exemptions: (1) § 522(b)(7)(A)—as investigatory records compiled for law enforcement purposes whose production would interfere with law enforcement purposes; and (2) § 552(b)(7)(E)—disclosure would reveal investigative techniques and procedures in an ongoing grand jury proceeding. In their papers in opposition to the motion defendants argue under (b)(7)(E) only, claiming that these documents pertain directly to the subject matter of a grand jury investigation. (Affidavit of Sean O'Shea ¶8).

affidavits in a motion for summary judgment. (Defendants' Memorandum of Law at 5-6).

In order to qualify for an exemption under § 552(b)(7)(A) the government agency must show that the records sought is an investigatory record compiled for law enforcement purposes the release of which would interfere with enforcement proceedings. *FBI v. Abramson*, 456 U.S. at 622, 102 S. Ct. at 2059. FOIA exemptions are to be narrowly construed. *Department of Air Force v. Rose*, 425 U.S. 352, 361, 96 S. Ct. 1592, 1599 (1976). The threshold requirement for qualifying under Exemption 7 turns on the purpose for which the document sought to be withheld was prepared. *Abramson*, 456 U.S. at 624, 102 S. Ct. at 2060. Unless the information was originally gathered for law enforcement purposes, the fact that it later became part of a criminal investigation does not alone exempt it from disclosure under the FOIA. *Gregory v. Federal Depository Ins. Corp.*, 470 F. Supp. 1329 (D.D.C. 1979), *rev'd on other grounds*, 631 F.2d 896 (D.C. Cir. 1980).

The documents at issue were prepared over nine years ago. Apparently they relate to [Agency's] audit and review of [Corporation's] charging practices on certain defense contracts. At this time it is impossible for the court, based on the record before it, to determine whether these files were merely routine auditing correspondence or whether their purpose was to determine if gounds existed for bringing an action against [Corporation]. *See Rural Housing Allowance v. U.S. Department of Agriculture*, 498 F.2d 73, 81 (D.C. Cir. 1974). *See also Irons v. Bell*, 596 F.2d 468, 473 (1st Cir. 1979); *United States v. Westinghouse Electric Corp.*, 788 F.2d 164 (3rd Cir. 1986).

The government agencies are also claiming an exemption under § 552(b)(7)(E). The defendants contend that, not only might the disclosure of the documents reveal the identity of witnesses and the strategy of the grand jury investigation, but that disclosure of the *Vaughn* index and the answers to plaintiff's interrogatories might also jeopardize the grand jury proceeding. *See Lykins v. U.S. Department of Justice*, 725 F.2d 1455 (D.C. Cir. 1984). The defendants also argue that these documents may very well be exempt under Fed. R. Crim. P. 6(e).

The purpose of exemption 7 is to prevent premature disclosure of the results of an investigation. "FOIA was never intended to permit an individual the opportunity to learn the details of the government's inquiry into his behavior prior to his indictment.... Where the government is pursuing a criminal investigation before a grand jury its work shall not be undermined by forcing disclosure through FOIA of its theories, its witnesses, its investigatory techniques and its deliberations as to the appropriate charges, if any, to be recommended." *Hatcher v. U.S. Postal Service*, 556 F. Supp. 331, 334 (D.D.C. 1982). The focus is on whether disclosure of the documents will impinge on the secrecy of the grand jury investigation. *United States v. Interstate Dress Carriers, Inc.*, 280 F.2d 52 (2d Cir. 1960). In the instant case, where [Corporation] is the subject of an ongoing grand jury investigation into its defense contract practices, the exemption under § 552(b)(7)(E) may very well apply.

The government, however, cannot justify withholding information on the basis of affidavits containing wholly conclusory statements. *Lykins v. U.S. Department of Justice*, 725 F.2d 1455, 1463 (D.C. Cir. 1984).

The affidavit should state what the particular reports are, which exemption applies to a particular segment, the length of the report and the circumstances of its production. The defendants have suggested in their cross-motion (Memorandum of Law, p. 5-6) that they will submit such particularized affidavits in place of a *Vaughn* index as part of a summary judgment motion to be made on a schedule imposed by the court.

We choose to proceed differently. The court has determined that the more expeditious way to proceed is to order the defendants to prepare a *Vaughn* index and to answer plaintiff's interrogatories and to submit these documents to the court for an *in camera* examination. At that time the court, with this additional information, will be able to determine whether the plaintiff is entitled to the index and answers in order to have some opportunity to challenge the government's claim of exemptions under the FOIA or whether the *Vaughn* index and answers should themselves be exempt from disclosure.

An order directing the submission of a *Vaughn* index and an answer to plaintiff's interrogatories for an *in camera* inspection by the court is issued simultaneously herewith.

/s/ JACOB MISHLER
U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE SECOND CIRCUIT

Docket No. ( )

[JOHN DOE CORPORATION]

PLAINTIFF,

v.

[JOHN DOE AGENCY]

and

[JOHN DOE GOVERNMENT AGENCY]

DEFENDANTS.

AFFIDAVIT OF JOHN T. BOESE

FILED UNDER SEAL

I, John T. Boese, being duly sworn, do depose and say:

1. I am a member of the firm of Fried, Frank, Harris, Shriver & Jacobson, counsel to appellant [John Doe Corporation ("Corporation")]. This affidavit is submitted in support of appellant's motion for expedited appeal of the March 28, 1988 District Court order in this Freedom of Information Act ("FOIA") case, 5 U.S.C. § 552. The order below denies [Corporation] access to a Vaughn index of the responsive documents and to answers to interrogatories regarding the search for such documents, and *sua sponte* holds that the government is not required to release any of the documents requested. (A copy of the order is attached as Exhibit A.)

2. As a government contractor, [Corporation] is subject to periodic, routine audits by [John Doe Agency ("Agency")]. During 1978, there was an exchange of correspondence between [Agency] and [Corporation] regarding the proper accounting treatment of charges for a Software Development Facility. Almost eight (8) years later, during 1986, a criminal investigation was begun by the United States Attorney's office and the defendant/appellee [John Doe Government Agency ("Government Agency")] relating to that same accounting issue. [Corporation], believing the 1978 correspondence was pertinent to the investigation, filed an FOIA request on September 30, 1986 seeking copies of all [Agency] records related to the subject matter of two letters between [Agency] and [Corporation] dated May 2, 1978 and July 11, 1978, respectively. Copies of the letters were attached to the request. After first requesting an extension of time to search for the documents "because they were so old," [Agency] then denied the request on November 18, 1986, on the ground that Dennis E. Milton, Assistant U.S. Attorney, Eastern District of New York, directed that the documents be withheld from disclosure under sections 552(b)(7)(A) and (E) of the FOIA. Sections (b)(7)(A) and (E) permit withholding of law enforcement records to the extent production "could be expected to interfere with enforcement proceedings," or "disclose techniques and procedures for law enforcement investigations or prosecutions," respectively. Dennis E. Milton originally learned about the letters from [Corporation], which specifically brought them to his attention during the process of responding to a grand jury subpoena issued in the course of the investigation regarding the Software Development Facility accounting.

3. On January 15, 1987 [Corporation] appealed the denial of its FOIA request. [Agency] responded to the appeal by letter dated February 18, 1987, stating that the records were not in its possession and that the request had been referred to Dennis E. Milton, who now controlled the documents, for his action. [Agency] indicated that the records were in the physical possession of [Government Agency]. [Agency] did not respond to the substance of [Corporation's] appeal.

4. [Corporation] then filed an identical FOIA request with [Government Agency] on February 3, 1987, seeking access to the [Agency] documents. [Government Agency] denied the request on June 9, 1987, citing only FOIA exemption (b)(7)(A). On June 15 [Corporation] filed an administrative appeal of the [Government Agency] decision to withhold the documents.

5. On July 22, 1987, having exhausted its administrative remedies pursuant to 552 U.S.C. § (a)(4)(B), [Corporation] filed a complaint for *de novo* review by the District Court of the [Agency] and [Government Agency] withholding. The Justice Department eventually denied [Corporation's] administrative appeal on August 6, 1987, citing exemption (b)(7)(A), and like [Agency], ignoring the substance of [Corporation's] arguments.

6. The two federal agencies answered [Corporation's] complaint on September 10, 1987, averring that the documents were exempt from disclosure pursuant to FOIA exemptions (b)(3), (b)(5), (b)(7), and Fed. R. Crim. P. 6(e). Exemption (b)(3) applies to matters specifically exempted from disclosure by other statutes; Exemption (b)(5) applies to certain "inter-agency or intra-agency memorandums or letters;" and

Fed. R. Crim. P. 6(e) requires the secrecy of matters "occurring before the grand jury." The answer claimed for the first time that the documents were obtained by [Government Agency] from [Agency] pursuant to a grand jury subpoena.

7. On September 28, 1987 [Corporation] moved to compel the preparation of a "*Vaughn* index," an affidavit providing an itemized inventory of the requested records, usually identifying the author, date of preparation, number of pages, and subject matter of each contested document. Such an index is appropriate for FOIA cases in this Circuit. *Donovan v. FBI*, 806 F.2d 55, 58 (2d Cir. 1986), citing *Brown v. FBI*, 658 F.2d 71, 73-74 (2d Cir. 1981) and *Vaughn v. Rosen*, 484 F.2d 820, 822 (D.C. Cir. 1973). As to each segregable portion of a record claimed to be exempt, the withholding agency must provide a non-conclusory explanation of why it should not be disclosed. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980). [Corporation] also served interrogatories seeking information about the search by [Agency] for documents responsive to the request, the transmittal of the documents from [Agency] to [Government Agency], and the timing of the grand jury subpoena in relation to [Corporation's] FOIA requests and appeals. No information was sought about the substance of the documents, beyond a general query about the subject matter of each.

8. The two federal agencies in turn moved for a protective order to stay preparation of the Vaughn index and answers to interrogatories until such time as the government prepared a summary judgment motion. [Corporation] opposed the cross-motion, and further requested that the case be placed under seal in order to

avoid public disclosure of certain statements about the grand jury made by Assistant U.S. Attorney Sean O'Shea in a Declaration attached to the government's cross-motion. The court granted the request to seal at the hearing held on October 23, 1987.

9. The procedural cross-motions were argued in chambers on October 23, 1987. On December 14, 1987 the court ordered [Agency] and [Government Agency] to prepare a Vaughn index (within parameters similar to those outlined above) and answers to [Corporation's] interrogatories, to be submitted to the court for *in camera* inspection. (A copy of the order is attached as Exhibit B.) The index and answers to interrogatories were filed on February 16, 1988.

10. Without further briefing or argument, on March 28, 1988 the court announced that it had reviewed the index and answers and determined that:

> [T]here is a substantial risk that disclosure of any of this material, the documents, the *Vaughn* index and the answers to [Corporation's] interrogatories, would jeopardize the grand jury proceeding. *See Hatcher v. U.S. Postal Service*, 556 F. Supp. 331, 334 (D.D.C. 1982). Defendants are not required to turn over any of these documents to the plaintiff.

The court order contains no further explanation of, and no other support for, the decision: It provides no explanation of how the *Vaughn* index or the answers to interrogatories, which were specifically tailored to avoid revealing the substance of the documents at issue, might reveal anything about the grand jury proceedings; nor does it explain how the secrecy of those proceedings would be compromised by release of 10 year old documents from a government auditing

agency. Furthermore, the Court cites as its sole suporting authority the *Hatcher* case which held, *inter alia*, that the petitioner was entitled to release of "materials generated in the course of routine contract negotiations . . . and oversight," the exact opposite of the result here. The order finally decides all issues in the case, although only procedural issues were before the court.

11. [Corporation] seeks expedited consideration of the District Court opinion because it believes the documents at issue confirm that the government was fully aware of and approved the accounting practices under investigation by the grand jury and if released before the grand jury concludes its investigation, will demonstrate to the Department of Justice that [Corporation's] accounting practices were proper.

12. In 1984 Congress eliminated most statutory priorities for federal court hearings, and for the most part gave courts the discretion to determine their own priorities. 28 U.S.C. § 1657. The statute requires that expedited consideration be given "if good cause therefor is shown." *Id.* Good cause is defined to include rights under the FOIA. The legislative history explained that "the value of disclosed information is [frequently] transitory," and "it is the intent of the Committee that the 'good cause' provision be liberally construed by the courts in granting requests for expedited consideration under the Freedom of Information Act." H.R. Rep. No 985, 98th Cong., 2d Sess. 6, *reprinted in* 1984 U.S. Code Cong. & Admin. News 5779, 5783.

13. This case is an excellent example of the situation Congress had in mind. If release of the documents is delayed for the time required for a normal appeal, the

documents may become useless and [Corporation's] FOIA rights may be irreparably lost.

14. There are two issues to be addressed on appeal. First, whether under settled FOIA law [Corporation] is entitled to a Vaughn index, answers to interrogatories concerning the search for documents, and reasoned, non-conclusory explanations for withholding any documents. Second, whether the district court properly held the documents at issue exempt from disclosure.

15. There are no complex facts to be considered and extensive legal briefing will not be required to understand or decide the case. Under such circumstances expedited appeal is entirely appropriate.

16. [Corporation] proposes that appellant's brief be filed April 20, that appellees' brief be filed two weeks later, on May 4, that appellant's reply brief be filed on May 11; and that oral argument be scheduled during the week of May 16, 1988, if the court deems it necessary.

Executed on April 13, 1988, in Washington, D.C.

/s/ JOHN T. BOESE
John T. Boese

Subscribed and sworn to before me
this 13th day of April, 1988.

[illegible]
Notary Public
My commission expires July 14, 1993

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 88-6098

JOHN DOE CORPORATION,

PLAINTIFF-APPELLANT,

against

JOHN DOE AGENCY
and
JOHN DOE GOVERNMENT AGENCY,

DEFENDANTS-APPELLEES.

DECLARATION IN SUPPORT OF MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR REHEARING OR REHEARING IN BANC

CHARLES E. KNAPP declares under penalty of perjury as follows:

1. I am the Assistant United States Attorney, of counsel to ANDREW J. MALONEY, United States Attorney for the Eastern District of New York, assigned responsibility for the above-captioned appeal.

2. On June 23, 1988, this Court issued its written decision in this case.

3. This declaration is submitted in support of defendants-appellees' motion for a thirty day extension of time to file a petition for rehearing or rehearing in banc.

4. Pursuant to Rule 40(a) of the Federal Rules of Appellate Procedure, a petition for rehearing or rehearing in banc must be filed within 14 days after the entry of judgment, *i.e.*, by July 7, 1988.

5. The extension of time is requested to allow this office to review the Court's opinion and consult with the Office of the Solicitor General of the United States, the Appellate Staff of the Civil Division of the Department of Justice, the Office of Information and Privacy of the Department of Justice, the Civil and Criminal Divisions of the Department of Justice, and the two government agencies involved in this action, to determine whether rehearing is desired, and, if so, to prepare the petition for rehearing or rehearing in banc.

6. As this Court is aware, the several issues raised by this action are of national significance and interest.

7. One issue presented is whether records originally compiled by an arguably non-law enforcement agency can ever qualify for FOIA Exemption (B)(7) when they are later recompiled by an agency undeniably involved in law enforcement and presented to a sitting grand jury investigating the requester, whose FOIA request was made after the investigation commenced.

8. A district court in the District of Columbia recently reached a conclusion contrary to this Court's on this issue of major importance to law enforcement. *Gould Inc.* v. *GSA*, No. 87-1319 (D.D.C. June 1, 1988).

9. Another issue presented is whether *in camera* review of a *Vaughn* index and interrogatory responses is limited only to cases involving national security or may, as here, be used where either a law enforcement or grand jury exemption to FOIA is raised.

10. This Court's present decision could have a wide ranging, deleterious effect on law enforcement, particularly on the orderly and efficient presentation of evidence to and secret work of investigatory grand juries.

11. It also creates a new and potent tool for criminal discovery, something the Congress did not contemplate when it passed the Federal Rules of Criminal Procedure which specifically address the discovery issue, *See* Fed. R. Crim. P. 16.

12. In the Second Circuit, at least, a criminal defense attorney may now be guilty of ineffective assistance of counsel were he not to file a FOIA suit and seek the immediate release of all evidence to be used against his client in the criminal case where that evidence was originally compiled by an arguably non-law enforcement agency.

13. Because of this decision's significance and very broad impact, the various agencies and departments of the United States need an additional thirty days to review it and reach a consensus on the filing of a petition for rehearing or rehearing in banc.

14. On July 5, 1988, I spoke with plaintiff's attorney, Milton Eisenberg, Esq., of Fried, Frank, Harris, Shriver & Jacobson, who objected to the granting of this motion for an extension of time to file the petition.

15. For the foregoing reasons, this decision is of major concern to the United States, and I respectfully request that the time for defendants-appellees to file a petition for rehearing or rehearing in banc be extended to August 8, 1988.

16. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: Brooklyn, New York
July 7, 1988

/s/ CHARLES E. KNAPP
CHARLES E. KNAPP
Assistant U.S. Attorney

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 88-6098

JOHN DOE CORPORATION,

PLAINTIFF-APPELLANT,

against

JOHN DOE AGENCY

and

JOHN DOE GOVERNMENT AGENCY

DEFENDANTS-APPELLEES.

DECLARATION

SEAN O'SHEA declares, upon penalty of perjury that:

1. I am the Assistant United States Attorney for the Eastern District of New York assigned to a criminal investigation of plaintiff.

2. A grand jury was actually empaneled on March 23, 1987 and has since been receiving evidence of possible criminal conduct by plaintiff.

3. I am aware of the existence of a Freedom of Information Act (FOIA) action brought by plaintiff and seeking disclosure of documents currently before the grand jury.

4. I am also aware of the nature and contents of the *Vaughn* index prepared as part of the defendants' response in the FOIA action.

5. Release to the plaintiff of the *Vaughn* index at this time could reasonably be expected to adversely

impact on the sitting grand jury's criminal investigation.

6. Because the general scope of the investigation is already known to plaintiff, release of the *Vaughn* index, by identifying the types of documents reviewed, and by identifying certain individuals and programs by title or acronym, could reasonably be expected to create the potential for plaintiff to, in the words of a district court, "tailor its responses to the Government's inquiries so as to provide the least possible relevant information . . . [thereby tending] to frustrate the [grand jury's] proceedings." *Fedders Corp. v. F.T.C.*, 494 F. Supp. 325, 329 (S.D.N.Y.), *aff'd*, 646 F.2d 560 (2d Cir. 1980).

7. In addition, release of the *Vaughn* index could reasonably be expected to apprise plaintiff, by negative inference, of types or classes of documents which may not yet have been reviewed by the grand jury, thereby creating the potential for such documents to be placed permanently beyond the grand jury's reach and hindering its investigation.

8. Release of the *Vaughn* index at this time, even without access to the underlying documents, could reasonably be expected to provide plaintiff with valuable clues concerning the grand jury's strategy and the direction of its inquiry.

9. Because plaintiff has been diligently preparing and debriefing its employees called before this grand jury, plaintiff is in the best position to fit those additional facts provided by the *Vaughn* index into what it has already discovered concerning the grand jury investigation.

10. Thus, the incremental information provided by release of this index could reasonably be expected to be

of substantial benefit to plaintiff and be detrimental to the efficient and effective functioning of the grand jury.

Dated: Brooklyn, New York
December 9, 1988

/s/ SEAN O'SHEA

SEAN O'SHEA
Assistant U.S. Attorney

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. CV-87-2520

[JOHN DOE CORPORATION],

PLAINTIFF,

against

[JOHN DOE AGENCY,
JOHN DOE GOVERNMENT AGENCY],

DEFENDANTS.

ORDER

MISHLER, Judge

An application having been made to this Court on December 7, 1988 by defendants seeking leave to litigate further the issue of the release of the *Vaughn* index in this action and, in light of the decision by the Court of Appeals in *John Doe Corp. v. John Doe Agency*, 850 F.2d 105, 110 (2d Cir. 1988), it is hereby

ORDERED, ADJUDGED AND DECREED that the defendants application is denied, that defendants are foreclosed from litigating any other issue pertaining to the immediate release of the *Vaughn* index, and it is further

ORDERED, ADJUDGED AND DECREED that release of the *Vaughn* index is stayed pending defendants' application for a further stay to the Court of Appeals for the Second Circuit, to be made no later than Friday, December 16, 1988. Should no application be made,

defendants are ordered to release a copy of the *Vaughn* index to plaintiff on Monday, December 19, 1988.

Dated: Brooklyn, New York
December 12, 1988

/s/ JACOB MISHLER

HONORABLE JACOB MISHLER
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. CV-87-2520

[JOHN DOE CORPORATION]

PLAINTIFF,

against

[JOHN DOE AGENCY]

and

[JOHN DOE GOVERNMENT AGENCY],

DEFENDANTS.

NOTICE OF APPEAL

Filed Under Seal December 13, 1988

NOTICE IS HEREBY GIVEN that the above-named defendants hereby appeal to the United States Court of Appeals for the Second Circuit from the order, denying defendants' application to litigate the issue of the release of the *Vaughn* index, entered in this action on or about the 12th day of December, 1988.

Dated: Brooklyn, New York
December 13, 1988

ANDREW J. MALONEY
United States Attorney
Eastern District of New York
Attorney for Defendants
225 Cadman Plaza East
Brooklyn, New York 11201

By: /s/ CHARLES E. KNAPP
CHARLES E. KNAPP
ASSISTANT U.S. ATTORNEY
(718) 330-2898-7100

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Civil Action No. CV-87-2520
(E.D.N.Y.)

JOHN DOE CORPORATION

PLAINTIFF-APPELLEE,

v.

JOHN DOE AGENCY

and

JOHN DOE GOVERNMENT AGENCY

DEFENDANTS-APPELLANTS.

AFFIDAVIT OF COUNSEL IN SUPPORT OF MOTION FOR A STAY

CITY OF WASHINGTON)
) ss.
DISTRICT OF COLUMBIA)

JOHN C. HOYLE, being duly sworn, deposes and says:

1. Plaintiff John Doe Corporation seeks disclosure under the Freedom of Informtion Act (FOIA), 5 U.S.C. 552, of documents for which John Doe Agency and John Doe Government Agency have claimed protection from disclosure under Exemption

7(A) and 7(E).[1] Defendants contend that disclosure could reasonably be expected to interfere with law enforcement proceedings and disclose techniques and procedures for law enforcement investigations.

In 1978, John Doe Agency exchanged letters with John Doe Corporation ("Corporation") concerning the allocation of certain costs incurred by the Corporation under its contracts. Slip op. 2.[2] In a letter dated May 2, 1978, John Doe Agency asserted that these costs were wrongly charged to a technical overhead account when they should have been charged directly to certain government contracts. *Id.* The Corporation responded on July 11, 1978, defending its allocation. *Id.*

The issue was revived eight years later, in 1986, during a grand jury investigation of possible fraudulent

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[1] Exemption 7 protects from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudication, (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual." 5 U.S.C. 552(b)(7).

[2] "Slip op." refers to the slip opinion filed by this Court on June 23, 1988 in *John Doe Corporation v. John Doe Agency and John Doe Government Agency*, No. 88-6098.

practices by the Corporation. Slip op. 3. That investigation was opened on July 18, 1985, with the Corporation named as a subject. The grand jury issued its first subpoena to the Corporation on February 21, 1986. The Corporation made a FOIA request on September 30, 1986, to John Doe Agency for "all documents, [etc.] . . . that are related in any way to the subject matter of the [1978] correspondence between [John Doe Agency] and [the Corporation] * * *." *Id.* and J. App. 1.[3] John Doe Agency denied the request on November 18, 1986, "upon the advice and direction" of an Assistant U.S. Attorney. J. App. 25. On November 20, 1986, the requested records were transferred from John Doe Agency to John Doe Government Agency.

On February 3, 1987, the Corporation made a FOIA request to John Doe Government Agency for "all documents that are related in any way to the subject matter of the [1978] correspondence between [John Doe Agency] and [the Corporation] * * *." J. App. 38. John Doe Government Agency denied the request, relying on Exemption 7. J. App. 40. The Corporation filed an administrative appeal. J. App. 41. When its appeal was not ruled on within the prescribed time, the Corporation filed suit in Federal District Court for the Eastern District of New York (Judge Jacob Mishler). J. App. 9, 11.

2. In the district court proceedings, the government opposed disclosure on the basis that the documents are exempt under Exemption 7(A) and 7(E). J. App. 106. The court stated that it could not determine "based on

[3] "J. App." refers to the Joint Appendix filed in *John Doe Corporation v. John Doe Agency and John Doe Government Agency*, No. 88-6098 (June 23, 1988).

the record before it," if the files were "merely routine auditing correspondence" or "whether their purpose was to determine if grounds existed for bringing an action against [Corporation]." J. App. 107. The court ordered the government "to prepare a *Vaughn* index and to answer plaintiff's interrogatories and to submit these documents to the court for an *in camera* examination." J. App. 109-110. After conducting the *in camera* examination, the district court held that the defendants could not be required to turn any of the documents over to plaintiff because "there is a substantial risk that disclosure of any of this material, the documents, the *Vaughn* index and the answers to [Corporation's] interrogatories, would jeopardize the grand jury proceeding." J. App. 114.

3. On June 23, 1988, this Court ruled that Exemption 7 did not protect the documents from disclosure because they were not "compiled for law enforcement purposes." Slip op. 8. The Court further held that since the documents themselves were not protected by Exemption 7 under the justification offered by the Government the *Vaughn* index was not protected by Exemption 7. *Id.* 11-12. In conclusion, the Court: (a) "reverse[d] the district court's decision upholding the claim of exemption under Section 552(b)(7) and Rule 6(e)," *id.* 12; (b) "vacate[d] the district court's decision on plaintiff's access to the *Vaughn* index," *id.* 12; and (c) "remand[ed] for further proceedings concerning the answers to interrogatories and any other exemptions claimed by the government for the Agency documents." *Id.* 12.

4. The Government filed a timely petition for rehearing and suggestion of rehearing *en banc*. This Court denied the petition and suggestion of rehearing

en banc on November 8, 1988. The Government then filed a motion for a stay of the issuance of the mandate, but this Court denied that motion on November 28, 1988.

5. On remand, the district court ruled on December 12, 1988, that the Government must turn over the *Vaughn* index to plaintiff without further proceedings. The district court stayed its order to permit the Government to file a motion with this Court by December 16, 1988.

6. The harm that will occur if a stay is not granted is set forth in the attached affidavit of Sean O'Shea, dated December 9, 1988. The legal basis for the requested stay is set out in the attached Memorandum of Law in Support of the Motion for a Stay.

7. Opposing counsel, Ms. Mira Marshall, has been notified of this motion. Ms. Marshall has stated that she opposes the Court's granting a stay.

Respectfully submitted,

/s/ JOHN C. HOYLE

JOHN C. HOYLE
Attorney, Appellate Staff
Civil Division, Room 3614
Department of Justice
Washington, D.C. 20530

Subscribed and sworn before me
this 15th day of December 1988.

/s/ BETTY JEAN FEEMSTER

NOTARY PUBLIC
MY COMMISSION EXPIRES AUGUST 14, 1990.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Civil Action No. CV. 87-2520 (E.D.N.Y.)

JOHN DOE CORPORATION,

PLAINTIFF-APPELLEE

v.

JOHN DOE AGENCY, ET. AL.

DEFENDANTS-APPELLANTS

ORDER

Filed Jan. 10, 1989

[The following order was entered at the bottom of a form "notice of motion" filed on December 16, 1988, by counsel for John Doe Agency and John Doe Government Agency, seeking a stay of the district court order pending a petition for a writ of certiorari seeking Supreme Court review of the Second Circuit's decision, dated June 23, 1988 (No. 88-6098).]

Before: Hon. Ellsworth A. VanGraafeiland, Hon. Ralph K. Winter, Hon. Roger J. Miner, CJJ

IT IS HEREBY ORDERED that the motion be and it hereby is denied.

ELAINE B. GOLDSMITH, Clerk

By: /s/ ARTHUR HELLER
ARTHUR HELLER
Deputy Clerk

January 10, 1989

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighteenth day of January one thousand nine hundred and eighty-nine.

Present: Hon. J. Edward Lumbard
Hon. Thomas J. Meskill
Hon. Ralph K. Winter
Circuit Judges,

Docket No. 88-6098

JOHN DOE CORPORATION,

APPELLANT,

v.

JOHN DOE AGENCY
and
JOHN DOE GOVERNMENT AGENCY

APPELLEES,

An application having been made to the Supreme Court of the United States and a certified copy of the order of said court having been received and filed, recalling the mandate of this court and staying its reissuance pending receipt of a response and further order of the Circuit Justice or the Supreme Court of the United States,

UPON CONSIDERATION THEREOF, the mandate of this court dated November 28, 1988, be and it hereby is recalled and stayed pending further order of the

Supreme Court or a Justice thereof, in accordance with the order of that court dated January 10, 1989.

ELAINE B. GOLDSMITH
Clerk

By: EDWARD J. GUARDARO
EDWARD J. GUARDARO
Deputy Clerk

SUPREME COURT OF THE UNITED STATES

No. 88-1083
JOHN DOE AGENCY
and
JOHN DOE GOVERNMENT AGENCY,
PETITIONERS,
v.
JOHN DOE CORPORATION

ORDER ALLOWING CERTIORARI.

Filed February 21, 1989.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

Februrary 21, 1989

☆ U.S. Government Printing Office: 1989—241-699/30001

PETITIONER'S

BRIEF

(5)

FILED
APR 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1883

In the Supreme Court of the United States

OCTOBER TERM, 1988

JOHN DOE AGENCY AND JOHN DOE GOVERNMENT AGENCY, PETITIONERS

v.

JOHN DOE CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether materials gathered for law enforcement purposes, but not originally obtained or created for law enforcement purposes, are "compiled for law enforcement purposes" within the meaning of Exemption 7 of the Freedom of Information Act, 5 U.S.C. 552(b)(7) (1982 & Supp. V 1987).

PARTIES TO THE PROCEEDING

Petitioners, defendants below, are John Doe Agency and John Doe Government Agency, pseudonyms for federal agencies whose real identities are stated in materials that have been filed under seal. Respondent, plaintiff below, is John Doe Corporation, a pseudonym for a private corporation whose real identity is stated in materials that have been filed under seal. (The government does not object to public disclosure of the names of petitioners, but we have refrained from such disclosure ourselves in light of the decision of the court of appeals to seal the record and use pseudonyms for all parties.)

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1083

JOHN DOE AGENCY AND JOHN DOE GOVERNMENT AGENCY, PETITIONERS

v.

JOHN DOE CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 850 F.2d 105. The opinion of the district court (Pet. App. 12a-14a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 15a-16a) was entered on June 23, 1988. A petition for rehearing was denied on November 8, 1988 (Pet. App. 17a). The petition for a writ of certiorari was filed on December 29, 1988, and was granted on February 21, 1989. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Freedom of Information Act, 5 U.S.C. 552 (1982 & Supp. V 1987), provides in pertinent part:

(a) Each agency shall make available to the public information as follows:

* * * * *

(3) * * * each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

* * * * *

(b) This section does not apply to matters that are—

* * * * *

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings, (B) would deprive a person of a right to a fair trial or an impartial adjudicati[illegible] (C) could reasonably be expected to consititute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential

source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or (F) could reasonably be expected to endanger the life or physical safety of any individual * * *.

STATEMENT

This case concerns the application of Exemption 7 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(7) (1982 & Supp. V 1987), to documents that the government originally obtained or generated in the course of routine audits but later compiled for presentation to a grand jury investigating possible violations of the criminal law. The distict court upheld the government's exemption claims in their entirety, finding that "there is a substantial risk that disclosure of any of this material, the documents, the *Vaughn* index[1] and the answers to [John Doe Corporation's] interrogatories, would jeopardize the grand jury proceeding." Pet. App. 14a. The court of appeals did not dispute either the factual accuracy of the district court's determination or its sufficiency to make out a claim under subsection (A) or subsection (E) of Exemption 7.[2] The court of appeals nevertheless reversed and re-

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[1] The *Vaughn* index (see *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974)) describes the documents that are being withheld by the government pursuant to Exemption 7.

[2] Exemption 7 exempts from mandatory disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information" gives rise to one or more of six specified harms. 5 U.S.C. 552(b)(7) (Supp. V 1987). One of the specified harms is that disclosure of such information or records "could reasonably be expected to in-

manded on the ground that Exemption 7 is completely unavailable as a threshold matter, because the documents' genesis in routine audits precludes their having been "compiled for law enforcement purposes" within the meaning of Exemption 7. The Circuit Justice stayed and recalled the mandate of the court of appeals, and this Court granted certiorari, in order to review that construction of the threshold criterion of Exemption 7.

1. In 1978, John Doe Agency exchanged letters with John Doe Corporation (Corporation or respondent) concerning the allocation of certain costs incurred by Corporation under its contracts. In a letter dated May 2, 1978, John Doe Agency asserted that those costs were wrongly charged to a technical overhead account when

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terfere with enforcement proceedings." 5 U.S.C. 552(b)(7)(A) (Supp. V 1987). Another is that disclosure "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law inforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. 552 (b)(7)(E) (Supp. V 1987). In our view, the district court's determination based on its review of the in camera submissions is best viewed as a determination that the criterion of subsection (A) is met in this case. The district court itself, at times, appears to have regarded interference with a pending grand jury investigation as a subject more appropriately addressed under subsection (E). J.A. 68 & n.1. In any event, we do not understand respondent to dispute that the documents at issue are exempt from mandatory disclosure under FOIA if they were "compiled for law enforcement purposes" within the meaning of Exemption 7 and their disclosure would in fact "jeopardize the grand jury proceeding." Rather, the dispute between petitioners and respondent centers on the meaning of "compiled for law enforcement purposes" (the issue before this Court) and, if that issue is resolved in the government's favor, on the accuracy of the district court's determination regarding jeopardy to the grand jury proceeding (an issue that the court of appeals did not address and should address in the first instance).

they should have been charged directly to certain government contracts. Corporation responded on July 11, 1978, defending its allocation. There was no further correspondence on the subject until 1986. See Pet. App. 2a; J.A. 22-28.

In 1985, the United States Attorney's Office for the Eastern District of New York began an investigation of possible fraudulent practices by Corporation. See J.A. 92; see also Letter from Charles E. Knapp, Assistant United States Attorney, to Hon. J. Edward Lumbard, Hon. Thomas J. Meskill, and Hon. Ralph K. Winter (May 19, 1988). The first grand jury subpoena arising out of that investigation was issued on February 21, 1986, by a regularly sitting grand jury in the Eastern District of New York. The subpoena requested documents related to the accounting issue that was the subject of the 1978 correspondence.

"In the ostensible belief that Agency documents relating to the 1978 correspondence would exonerate it, and no doubt in the unstated belief that the documents would be useful in responding to the investigation or defending criminal charges, Corporation filed a request with the Agency for such documents under the FOIA on September 30, 1986." Pet. App. 2a. Specifically, Corporation requested "all documents, [etc.] that are related in any way to the subject matter of the [1978] correspondence between [John Doe Agency] and [John Doe Corporation]." J.A. 19. On November 18, 1986, John Doe Agency, acting on the advice of an Assistant United States Attorney for the Eastern District of New York, denied the request, citing Exemptions 7(A) and 7(E). J.A. 29. On November 20, 1986, the requested records were transferred from John Doe Agency to John Doe Government Agency, a federal law enforcement agency. J.A. 92.

On February 3, 1987, Corporation made a FOIA request to John Doe Government Agency for "all documents that are related in any way to the subject matter of the [1978] correspondence between [John Doe Agency] and [John Doe Corporation]." J.A. 46. On June 9, 1987, John Doe Government Agency denied the request, relying on Exemption 7(A). J.A. 49-50. Corporation filed an administrative appeal on June 15, 1987. J.A. 51-53. On July 22, 1987, having received no decision on its administrative appeal, Corporation filed suit in the United States District Court for the Eastern District of New York. J.A. 11-14.[3]

Meanwhile, on March 23, 1987, a special grand jury was empaneled in the Eastern District of New York to consider evidence arising out of the investigation of Corporation's accounting practices. J.A. 83. All of the documents that are the subject of Corporation's FOIA requests have been presented to the grand jury. J.A. 61. As of the date of this brief, the grand jury is still sitting and is considering the filing of criminal charges against Corporation.

2. In the district court proceedings on respondent's FOIA suit, the government opposed disclosure on the basis, among others, that the documents are exempt under Exemptions 7(A) and 7(E). See note 2, *supra*. The government also opposed the preparation of a *Vaughn* index or answers to interrogatories, on the ground that giving such documents to respondent would itself reveal information that respondent is seeking in this lawsuit and interfere with the grand jury proceeding. C.A. App. 65-74; see also J.A. 60-61. To accommodate the government's concerns, but also aid its consideration of the case, the court ordered the government to prepare a *Vaughn* index and to answer respondent's interrogatories, but it also ordered these

[3] The administrative appeal was denied on August 6, 1987, while the lawsuit was pending before the district court.

documents to be submitted to the court for an in camera examination rather then furnished to respondent. J.A. 62-71.[4]

After conducting the in camera examination, the district court ruled on March 28, 1988, that petitioners are not required to turn over any of the documents to Corporation. Pet. App. 12a-14a. The court found that "there is a substantial risk that disclosure of any of this material, the documents, the *Vaughn* index and the answers to [John Doe Corporation's] interrogatories, would jeopardize the grand jury proceedings." *Id.* at 14a.

3. Respondent appealed, and the case was expedited. On June 23, 1988, the court of appeals ruled that Exemption 7 did not protect the documents from disclosure because they were not "compiled for law enforcement purposes" (Pet. App. 7a-8a)—a phrase the court construed to mean *originally obtained or generated* for law enforcement purposes. The court's entire analysis of this issue was as follows (*ibid.*):

> The district court held that the documents were exempt under FOIA Subsection (b)(7), which exempts from disclosure "matters that are . . . records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information[] could reasonably be expected to interfere with enforcement proceedings." Although the district court concluded that disclosure would "jeopardize" the grand jury proceedings, it made no finding as to whether the records sought were "compiled for law enforcement

[4] At respondent's request, the documents that were submitted to the district court for in camera examination have also been furnished under seal to the Clerk of this Court.

purposes." Such a finding is essential to a valid claim of exemption under Subsection (b)(7). • • •

In the instant case, the documents requested were generated by Agency independent of any investigation in the course of its routine monitoring of Corporation's accounting procedures with regard to Corporation's defense contracts. The records were compiled in 1978, seven years before the investigation began in 1985. They were thus not "compiled for law enforcement purposes" and are not exempted by Subsection (b)(7).

The 1974 amendments to the FOIA make it clear that a governmental entity cannot withhold materials requested under the FOIA on the ground that materials that were not investigatory records when compiled have since acquired investigative significance. Originally, the FOIA exemption in question applied to "investigatory files." In 1974, however, Congress substituted the word "records" for "files" to insure that documents produced in the routine course of government operations would not be withheld under Subsection (b)(7) merely because they have been commingled with investigative materials generated later in the course of a law enforcement proceeding. [*NLRB* v.] *Robbins Tire & Rubber [Co.]*, 437 U.S. [214,] 227-30 [(1978)]; *see also* [*FBI* v.] *Abramson*, 456 U.S. [615,] 626-27 [(1982)]. The attempt in the instant case to withhold documents generated in the course of routine audits because they are now part of an investigatory file thus contravenes the obvious intent of the 1974 amendments to FOIA. *See Hatcher* [v. *United States Postal Service*], 556 F. Supp. [331,] 335 [(D.D.C. 1982)].

We realize that compliance with the FOIA may compel the government to disclose matters that are

ordinarily beyond the scope of discovery in criminal investigations and thus may enable a potential defendant to prepare responses to the investigation and to construct a defense to criminal charges. That is a concern that should be addressed to Congress, however.

4. The court of appeals denied rehearing and rehearing en banc on November 8, 1988. Pet App. 17a. The court of appeals also refused to stay its mandate, which issued on November 28, 1988. *Id.* at 16a. On December 12, 1988, the district court held that the decision of the court of appeals required that the government turn over the *Vaughn* index to Corporation. J.A. 86-87. The court of appeals denied a stay of that order on January 10, 1989 (J.A. 96), but later that day the Circuit Justice entered a temporary stay pending receipt of Corporation's response to the government's stay application. On January 30, 1989, the Circuit Justice granted a full stay pending the disposition of the petition for a writ of certiorari. *John Doe Agency* v. *John Doe Corp.*, 109 S. Ct. 852 (1989) (Marshall, J., in chambers). On February 21, 1989, this Court granted certiorari. 109 S. Ct. 1116.

SUMMARY OF ARGUMENT

A. The statute does not, by its terms, require that records or information be *originally* compiled for law enforcement purposes in order to qualify for protection under Exemption 7. Rather, Exemption 7 requires only that the records or information be "compiled" for law enforcement purposes. The word "compiled" does not itself connote a distinction between the original obtaining of information and the act of gathering it from other sources – inside or outside the government. The dictionary definition of "compile" includes "to collect and edit into a

volume[;] to compose out of materials from other documents." *Webster's Ninth Collegiate Dictionary* (1985). In its ordinary usage, "[a] compilation of information or materials 'compiled' for law enforcement purposes therefore can be 'composed out of materials from other documents'—including other documents already generated or collected by the government for non-law enforcement purposes." *Gould, Inc.* v. *GSA*, 688 Supp. 689, 698 (D.D.C. 1988).

The court of appeals has not accorded the word "compiled" its plain meaning or even acknowledged that the word, in ordinary usage, refers to an act that can performed many times on the same documents or information. Only by departing from the ordinary meaning of the word "compiled" could the court of appeals reach the conclusion that records or information could not be "compiled for law enforcement purposes" if they were not originally obtained for those purposes.

B. The court of appeals also relied on the legislative history of the 1974 amendments to FOIA to support its reasoning. The language of the statute so plainly supports the government's position and refutes that of the court of appeals that resort to the legislative history is basically superfluous. In any event, the court of appeals seriously misinterpreted the legislative record.

The 1974 amendment to Exemption 7 was a congressional reaction to four decisions of the United States Court of Appeals for the District of Columbia Circuit. See *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 227-230 (1978). One of those decisions was *Ditlow* v. *Brinegar*, 494 F.2d 1073 (D.C. Cir. 1974), in which the court held that *everything* found in an investigatory file compiled for law enforcement purposes was automatically exempt from mandatory disclosure under the then-current

version of Exemption 7, 5 U.S.C. 552(b)(7) (1970). Fearing that agencies would use that rule to commingle otherwise nonexempt material with exempt material in law enforcement files, Congress amended the statute to overrule *Ditlow* and similar decisions. See *Robbins Tire*, 437 U.S. at 227-230. Congress did not, however, change in any way the statutory phrase "compiled for law enforcement purposes." Rather it changed the description of the exempt materials from "investigatory *files* compiled for law enforcement purposes" (5 U.S.C. 552(b)(7) (1970) (emphasis added)) to "investigatory *records* compiled for law enforcement purposes" (5 U.S.C. 552(b)(7) (1982) (emphasis added)). In addition, Congress changed the status of having been "compiled for law enforcement purposes" from a *sufficient* condition for withholding to a *necessary* condition, adding the further requirement that the records meet one of six specific criteria.

The clear thrust of the 1974 amendments is to make an agency and a court look at each individual record and determine whether withholding that record is justified by one of the six specific policies. In that way, Congress prevented unwarranted "commingling" and the withholding of non-law-enforcement information just because it was contained in a file that also contained legitimate law enforcement information. In contrast to Congress's intent to do away with broad determinations based solely on the kinds of files in which documents are located and substitute substantive examination in light of the six criteria justifying exemption from mandatory disclosure, the court of appeals in the present case interpreted Congress's action as a mandate to engage in formalistic determinations and to require the release of records that fit precisely within the categories that Congress determined should be exempt. Thus, the decision of the court of ap-

peals turns the legislative history of the 1974 amendments on its head and reaches a result directly contrary to Congress's intent.

C. The assertion by the court of appeals (Pet. App. 8a) that it was only following the dictates of the statute, notwithstanding the anomalous results of its decision, is not only at odds with the plain language of the statute and its legislative history. It is also contrary to the understanding of Exemption 7 expressed in this Court's decisions. In *Robbins Tire*, 437 U.S. at 244, this Court, after carefully canvassing the legislative history of the 1974 amendments, explained that the essential determination in ruling on an Exemption 7 claim is whether release of the requested documents would contravene any of the six criteria set forth in the exemption.

Moreover, the reasoning of the court of appeals markedly departs from the approach that this Court took in *FBI* v. *Abramson*, 456 U.S. 615 (1982). The issue in that case—closely related to the issue here—was whether information originally compiled for law enforcement purposes and meeting the other criteria of Exemption 7 lost its exempt status when it was recompiled for non-law-enforcement purposes. Looking to "the intention of Congress, * * * the structure of the Act, and * * * the purposes of the statute" (*id.* at 625), this Court specifically ruled that "[t]he enumeration of [six] categories of undesirable consequences [in Exemption 7] indicates that Congress believed the harm of disclosing this type of information would outweigh its benefits" (*id.* at 627-628). The Court found "nothing to suggest, and no reason for believing, that Congress would have preferred a different outcome simply because the information is now reproduced in a non-law-enforcement record." *Id.* at 628. The rationale of *Abramson* indicates that "compiled for law enforcement purposes" is not to be construed as a high, or

highly technical, barrier to claims of exemption. Rather, as this Court said, "[i]t is therefore critical that the compiled-for-law-enforcement requirement be construed to avoid the release of information that would produce the undesirable results specified [in the six criteria listed in the exemption]." 456 U.S. at 630.

Finally, Congress has recently expressed approval of the practical approach adopted by this Court in *Abramson*. See S. Rep. No. 221, 98th Cong., 1st Sess. 23 (1983) (containing pertinent discussion and citing *Abramson* twice with apparent approval). Exemption 7, as amended in 1986, applies to "records *or information* compiled for law enforcement purposes." The amendment plainly is designed "to ensure that sensitive law enforcement information is protected under Exemption 7 *regardless of the particular format or record in which the record is maintained*." *Ibid.* (emphasis added). Congress's most recent view of how Exemption 7 is to be applied is thus very much at odds with the erroneous approach of the court of appeals in this case.

ARGUMENT

DOCUMENTS THAT ARE ORIGINALLY COMPILED FOR NON-LAW-ENFORCEMENT PURPOSES, BUT LATER COMPILED FOR LAW ENFORCEMENT PURPOSES, ARE "COMPILED FOR LAW ENFORCEMENT PURPOSES" WITHIN THE MEANING OF EXEMPTION 7

Through FOIA, Congress has provided for broad disclosure of government documents in order "to ensure an informed citizenry, vital to the functioning of a democratic society." *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); *EPA* v. *Mink*, 410 U.S. 73, 80 (1973); see also *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, No.

87-1379 (Mar. 22, 1989), slip op. 22-25. But Congress equally realized that "legitimate governmental and private interests could be harmed by release of certain types of information and provided nine specific exemptions under which disclosure could be refused." *FBI* v. *Abramson*, 456 U.S. 615, 621 (1982). Congress thus intended to provide a "workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary." H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966), *reprinted in* Subcomm. on Administrative Practice and Procedure, Senate Comm. on the Judiciary, 93d Cong., 2d Sess., *Freedom of Information Act Source Book: Legislative Materials, Cases, Articles* 27 (1974) [hereinafter *FOIA Source Book*]. See also *EPA* v. *Mink*, 410 U.S. 73, 80 (1973); *Baldrige* v. *Shapiro*, 455 U.S. 345, 352 (1982).

One of the types of information that Congress recognized should not be made public is "investigatory materials which might be used in a law enforcement action." *FBI* v. *Abramson*, 456 U.S. at 621. To protect such materials from disclosure, Exemption 7 exempts from FOIA's disclosure requirements "records or information compiled for law enforcement purposes" to the extent that their production meets any one of six criteria set forth in the exemption. Exemption 7, first and foremost, makes clear in the law enforcement context what is true in all contexts: that the purpose of FOIA is *not* to supplement or displace the rules of discovery. See *Robbins Tire*, 437 U.S. at 236-239, 242 (construing Exemption 7(A) not to require discovery not permitted by NLRB's discovery rules); *id.* at 243 (Stevens, J., concurring) ("A statute that authorized discovery greater than that available under the rules normally applicable to an enforcement proceeding would 'interfere' with the proceeding in [the relevant] sense. * * * [The Court's] rationale applies equally to any enforcement

proceeding."); *Lewis* v. *IRS*, 823 F.2d 375, 380 (9th Cir. 1987); see also *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 801-802 (1984); *Baldrige* v. *Shapiro*, 455 U.S. at 360 n.14; *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975); *Renegotiation Board* v. *Bannercraft Co.*, 415 U.S. 1, 24 (1974); *McClellan Ecological Seepage Situation* v. *Carlucci*, 835 F.2d 1282, 1287 (9th Cir. 1987); *Cleary* v. *FBI*, 811 F.2d 421, 424 n.4 (8th Cir. 1987). The court of appeals acknowledged that point (Pet. App. 6a-7a ("the FOIA was not principally intended to be a device enlarging the scope of private discovery in litigation")), but it proceeded, by its own admission, to "compel the government to disclose matters that are ordinarily beyond the scope of discovery in criminal investigations" (*id.* at 8a).

The court of appeals has upset the balance provided by Congress and vitiated to a significant extent the protection for law enforcement materials provided in Exemption 7 by imposing a requirement under Exemption 7 that the records or information be *originally* gathered for law enforcement purposes. The court has held that records or information that are currently being used in an ongoing criminal law investigation are not protected from disclosure by Exemption 7 because they were originally obtained by the government in the course of an agency's routine monitoring functions and only later compiled for law enforcement purposes.

Such premature criminal discovery as sanctioned by the court below would systematically (1) provide the targets of grand jury (or other) investigations with valuable clues concerning the grand jury's (or agency's) strategy and direction of its inquiry; (2) apprise such targets, by negative inference, of types or classes of documents that may not yet have been reviewed by the grand jury (or agency), thereby creating the potential for such documents

to be placed permanently beyond the grand jury's (or agency's) reach and hindering its investigation; and (3) create the potential for the target of the investigation to "tailor its responses to the Government's inquiries so as to provide the least possible relevant information * * * [thereby tending] to frustrate the [grand jury's or agency's] proceedings." *Fedders Corp.* v. *FTC*, 494 F. Supp. 325, 329 (S.D.N.Y.), aff'd mem., 646 F.2d 560 (2d Cir. 1980). And, again, the court of appeals did not deny that its decision would have those untoward effects, instead admitting that it would "enable a potential defendant to prepare responses to the investigation and to construct a defense to criminal charges." Pet. App. 8a.

The decision of the court of appeals is in conflict with the plain language of the exemption, its legislative history, and its underlying purpose.

A. Under The Plain Meaning Of Exemption 7, Documents Are "Compiled For Law Enforcement Purposes" If They Are Gathered Together For Law Enforcement Purposes, Regardless Of Whether They Were Originally Obtained By The Government For Such Purposes

The analysis in this statutory case, of course, "must begin with the language of the statute itself." *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568 (1979); *Consumer Product Safety Commission* v. *GTE Sylvania*, 447 U.S. 102, 108 (1980); see *Landreth Timber Co*, v. *Landreth*, 471 U.S. 681, 685 (1985); *United States* v. *Ron Pair Enterprises, Inc.*, 109 S. Ct. 1026, 1030 (1989). Congress has provided that in order for records or information to satisfy the threshold requirement of Exemption 7 they must have been "compiled for law enforcement purposes." The sole issue in this case involves the meaning to be given to the word "compiled." Specifically, the question is

whether the court of appeals erred in holding that, in order for records of information to satisfy the statutory requirement that they be "compiled for law enforcement purposes," they must have been originally obtained by the government for those purposes.

This Court has repeatedly stated that "words used in a statute are to be given their ordinary meaning in the absence of persuasive reasons to the contrary." *Burns* v. *Alcala*, 420 U.S. 575, 580-581 (1975); see also *Escondido Mutual Water Co.* v. *Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984); *Perrin* v. *United States*, 444 U.S. 37, 42 (1979). The court of appeals erred in this case in giving "compiled" an unduly narrow and artificial meaning, rather than according the statutory word its ordinary meaning. Cf. *Beech Aircraft Corp.* v. *Rainey*, 109 S. Ct. 439, 446-447 (1988) (criticizing lower court's interpretation of a rule of evidence because that interpretation unjustifiably departed from the precise words used in the rule and their dictionary definition). In its ordinary usage, "compile" does not have the restricted meaning accorded to it by the court of appeals. In common parlance, "compile" does not connote a distinction between the original obtaining of information and the act of gathering it from other sources.

According to *Webster's Ninth Collegiate Dictionary* (1985), the word "compile" means "to collect and edit into a volume[;] to compose out of materials from other documents[;] to run (as a program) through a compiler[;] to build up gradually." Thus, under the ordinary meaning of "compile," records or information can be "compiled for law enforcement purposes" if they are "composed out of materials from other documents," and such documents could include those "already generated or collected by the government for non-law enforcement purposes * * * [because] materials originally drafted, generated, or even

compiled for one purpose • • • subsequently can be 'compiled for law enforcement purposes.' " *Gould Inc.* v. *GSA*, 688 F. Supp. 689, 698 (D.D.C. 1988); see also *Crowell & Moring* v. *Department of Defense*, 703 F. Supp. 1004, 1009-1010 (D.D.C. 1989); *Raytheon Co.* v. *Department of the Navy*, Civ. No. 88-94 (D.D.C. Jan. 5, 1989), slip op. 9.[5]

The court of appeals did not even acknowledge that in its ordinary usage the word "compiled" refers to an act that can be performed many times on the same documents or information. Instead, the court interpreted "compiled" throughout its opinion as meaning "originally compiled." See, *e.g.*, Pet. App. 7a-8a (referring to the requested records as "materials that were not investigatory records when compiled [but] have since acquired investigatory significance"). The court relied on one and only one fact in determining that the records at issue were not "compiled for law enforcement purposes": that they were generated by John Doe Agency for purposes other than law enforcement before they were compiled by John Doe Government Agency for law enforcement purposes. Thus, the basis underlying the decision of the court of appeals is that, once the records or information were originally obtained in 1978 for a purpose other than law enforcement, they could not later be "compiled for law enforcement purposes." See Pet. App. 7a. The language of Exemption 7, however, neither contains nor implies any such restriction.

Under the court's analysis, a federal law enforcement agency such as John Doe Government Agency "compiles" auditing records for law enforcement purposes when it gets them from an organization outside the government, such as Price Waterhouse or Arthur Andersen, but not

[5] We have previously furnished the Clerk copies of the *Crowell & Moring* and *Raytheon* decisions, which we believe correctly analyze the issue that is now before this Court.

when it gets them from another government agency, such as John Doe Agency. The plain meaning of the word "compile" does not permit such a distinction. It is the pulling together of materials that constitutes the compiling. It does not matter whence the documents were obtained.

For example, it is in the ordinary use of the term "compiled" that we say that opinions of this Court collected for the purpose of teaching a course in constitutional law have been "compiled," even though the opinions were not originally generated for that purpose. Or one might readily say that the famous collection of correspondence published in *Holmes-Laski Letters* (M. Howe ed. 1953) has been "compiled" for historical purposes. Yet the court of appeals, if faithful to its reasoning in this case, would have to disagree. To paraphrase, the court would have to say: "[T]he [letters] were generated by [Justice Holmes and Mr. Laski] independent of any [historical purpose] in the course of [their friendship]. The [letters] were compiled in [1916-1935], [18 to 37] years before the [publication] began in [1953]. They were thus not 'compiled for [historical] purposes' • • •." Pet. App. 7a. The court would necessarily regard the letters as "materials that were not [historical] records when compiled [but] have since acquired [historical] significance." *Id.* at 7a-8a. Yet such statements would ascribe to the word "compiled" a meaning that is far removed from its ordinary usage.

This Court itself has used the word "compiled," quite naturally, to refer to the process of pulling together at one time records and information that were generated (or even compiled) at an earlier time and for different purposes. In *FBI* v. *Abramson*, 456 U.S. at 622 n.5, the Court described the respondent's argument in that case (which the Court proceeded to reject) as being "that information admittedly compiled in a law enforcement record loses its exemption

when recompiled." The Court thus was well aware that to be "compiled" once is not at all inconsistent with being "compiled" again. The question is what consequences flow from the second compilation. *Abramson* holds that the second compilation does not negate, for purposes of Exemption 7, the fact that the information was once compiled for law enforcement purposes. And the related question presented here—whether the first compilation somehow negates the fact that the information was *later* compiled for law enforcement purposes—is, fortunately, answered by the words of the statute itself, which applies unequivocally (at the threshold) to *all* "records or information compiled for law enforcement purposes" and not just records or information originally so compiled.[6]

Likewise, the Court's recent opinion in *United States Department of Justice* v. *Reporters Committee for Freedom of the Press, supra,* repeatedly uses the word "compiled" and its variants to describe the collection of information into FBI "rap sheets," which often consist of information that was, like the audit records at issue in this case, generated long before the information was gathered together in the particular format that is of significance for FOIA purposes. The Court noted that "the issue here is whether the *compilation* of otherwise hard-to-obtain information alters the privacy interest implicated by disclosure of that information." Slip op. 14 (emphasis added). The Court referred to "a congressional intent to protect the privacy of rap-sheet subjects, and a concomitant recognition of the power of *compilations* to affect personal privacy that outstrips the combined power of the bits

[6] Of course, a showing that information was so compiled suffices only to get the government past the threshold inquiry. The government still must show that the information comes within one or more of subsections (A)-(F).

of information contained within." *Id.* at 15 (emphasis added). The Court found a "basic difference between scattered bits of criminal history and a federal *compilation.*" *Id.* at 17 (emphasis added); see also *id.* at 16 ("a strong privacy interest inheres in the nondisclosure of *compiled* computerized information") (emphasis added); *id.* at 30 ("When the subject of such a rap sheet is a private citizen and when the information is in the Government's control as a *compilation,* * * * the privacy interest protected by Exemption 7(C) is in fact at its apex * * *.") (emphasis added). There is, of course, nothing out of the ordinary about those references, but they serve to show that there *is* something very much out of the ordinary about the way the court of appeals here used the word "compiled," for the court of appeals seemed to think that information can be "compiled" only once, at the time of its generation, and thereafter is not "compiled" when it is collected for another use. As *Reporters Committee* illustrates, that simply is not what the word means.

Even respondent has used the noun form of the word "compiled" in its ordinary sense to refer to the gathering together of documents, whether or not they were generated or compiled at an earlier time for a different purpose. In its FOIA requests of September 30, 1986, and February 3, 1987, respondent "ask[ed] that copies of the requested materials be furnished to us as soon as individual items are available, and that your response to this request not await a *compilation* of all the materials requested." J.A. 21, 47-48. Thus respondent, unlike the court of appeals, obviously and quite properly recognized that the documents' having been "compiled" once for the purpose of routine audits would in no way prevent their being compiled again later for a different purpose.

Congress had good reason for protecting in Exemption 7, subject to a showing under subsections (A)-(F), all documents that have at some point been "compiled for law enforcement purposes" and not only those documents that were originally generated or obtained for such purposes. As the district court stated in *Gould*, 688 F. Supp. at 698:

> Information drawn from a number of different sources can be benign when separately considered. When combined, or "compiled for law enforcement purposes," however, these various pieces of information can indeed become accusatory. As a direct result of their becoming accusatory in nature, these materials may qualify for Exemption 7 of FOIA for their release may interfere with an ongoing law enforcement investigation. Hence, even though the component, derivative parts of a criminal investigatory file, when considered independently and without reference to the remainder of the materials in the investigatory file, may not be covered by any exemption from FOIA, those materials, once combined and incorporated in a law enforcement "mosaic" may well be entitled to Exemption 7.

Accord *Crowell & Moring*, 703 F. Supp. at 1010.

In sum, the ruling of the court of appeals that Exemption 7(A) cannot be invoked in this case is at odds with the plain meaning of the exemption. The artificial distinction that the court of appeals has drawn between documents that were originally obtained for law enforcement purposes and those that were not so originally obtained, but later gathered together for law enforcement purposes, finds no support in the plain language of Exemption 7. The government refused to release the documents at issue because they were gathered together for law enforcement

purposes and have consequently acquired investigatory significance.[7] The purpose for which they were originally obtained is irrelevant. The documents have now been gathered together "for law enforcement purposes." Thus, the threshold requirement of Exemption 7 is satisfied, and this Court should remand so that the court of appeals can determine whether (as the district court found) the government has met its burden of showing that the further requirements of subsection (A) or subsection (E) are also satisfied.

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[7] To be sure, the documents were compiled for law enforcement purposes by John Doe Government Agency after respondent requested them from John Doe Agency and John Doe Agency denied the request. In some circumstances, that order of proceeding could raise questions about the bona fides of the government's claims that it was for law enforcement purposes – and not solely to defeat the FOIA request – that the agency compiled the documents, and that production of the documents would interfere with enforcement proceedings. Here, however, the pendency of the grand jury investigation and the consideration by the grand jury of all of the documents that respondent has requested obviously corroborate the legitimacy of the law enforcement purposes of the 1986 compilation. There is, moreover, no proper basis for a prophylactic rule that Exemption 7 can be asserted only in cases in which the compilation preceded rather than followed the FOIA request. Such a rule would seriously undermine the important statutory purposes of Exemption 7. And no such rule applies in other situations in which agencies take steps *after* they receive FOIA requests in order to bring documents within a FOIA exemption and thus assure compliance with the statutory objective that sensitive documents not be disclosed. See, *e.g.*, *Goldberg* v. *Department of State*, 818 F.2d 71, 77 (D.C. Cir. 1987), cert. denied, 108 S. Ct. 1075 (1988); *Miller* v. *Department of State*, 779 F.2d 1378, 1388 (8th Cir. 1896); *Baez* v. *Department of Justice*, 647 F.2d 1328, 1332-1333 (D.C. Cir. 1980).

B. The Legislative History Of Exemption 7, As Enacted And As Amended In 1974, Confirms The Plain Meaning Of Exemption 7

The court of appeals also relied on the legislative history of the 1974 amendments to FOIA to support its reasoning. Inquiry into the legislative history was basically superfluous in this case in view of the plain statutory language supporting the government's position. See, *e.g.*, *Garcia* v. *United States*, 469 U.S. 70, 75 (1984) (when terms of a statute are unambiguous, judicial inquiry is complete, except in "rare and exceptional" circumstances). In any event, the court seriously misinterpreted the legislative record.

This Court thoroughly discussed the legislative history of Exemption 7 in *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 224-236 (1978). As originally enacted, Exemption 7 permitted nondisclosure of "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party." 80 Stat. 251. By that exemption, "Congress recognized that law enforcement agencies had legitimate needs to keep certain records confidential, lest the agencies be hindered in their investigations or placed at a disadvantage when it came time to present their cases." *Robbins Tire*, 437 U.S. at 224. The exemption was intended to prevent FOIA from "giv[ing] a private party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceedings." H.R. Rep. No. 1497, *FOIA Source Book* 32; see *Alyeska Pipeline Service Co.* v. *EPA*, 856 F.2d 309, 313 (D.C. Cir. 1988). "FOIA was *not* intended to function as a private discovery tool." *Robbins Tire*, 437 U.S. at 242 (emphasis in original); see also *United States* v. *Murdock*, 548 F.2d 599, 601 (5th Cir. 1977); *United States* v. *United States District Court*, 717 F.2d 478, 480-481 (9th Cir. 1983).

The "workable balance" that FOIA was intended to provide, H.R. Rep. No. 1497, *FOIA Source Book* 27, included recognition that it is "necessary for the very operation of our Government to allow it to keep confidential certain material, such as the investigatory files of the Federal Bureau of Investigation." S. Rep. No. 813, 89th Cong., 1st Sess. (1965), *FOIA Source Book* 38; see also *id.* at 82 (statement of Congressman Gallagher). Thus, foremost among the purposes of Exemption 7 was to prevent "harm [to] the Government's case in court." *Id.* at 44; see *Robbins Tire*, 437 U.S. at 224.

In 1974, Congress amended FOIA in several respects. See *Robbins Tire*, 437 U.S. at 226-227. The 1974 amendment to Exemption 7 resulted from a proposal on the floor by Senator Hart. *Id.* at 227. Senator Hart indicated his continuing agreement with the original purposes behind Exemption 7 but expressed concern that recent court decisions had permitted the exemption to be applied "whenever an agency can show that the document sought is an investigatory file compiled for law enforcement purposes * * * without the need of the agency to show why the disclosure of the particular document should not be made." Senate Debate May 30, 1974, *reprinted in* Subcomm. on Government Information and Individual Rights of the House Comm. on Government Operations & Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess., *Freedom of Information Act and Amendments of 1974 (Pub. L. 93-502) Source Book: Legislative History, Texts, and Other Documents* 332 (1975) [hereinafter *1975 Source Book*].

Senator Hart stated in a colloquy with Senator Kennedy (*1975 Source Book* 349) that his proposed amendment was intended to respond specifically to and overrule four decisions of the United States Court of Appeals for the District of Columbia Circuit.[8] *1975 Source Book* 333. In

[8] The four decisions were *Weisberg* v. *United States Department of Justice*, 489 F.2d 1195 (D.C. Cir. 1973) (en banc), cert. denied, 416

one of those four decisions—*Ditlow* v. *Brinegar*, 494 F.2d 1073 (D.C. Cir. 1974)—the court of appeals had indicated that, in determining whether Exemption 7 applied, the *only* question was whether the requested material was found in an investigatory file compiled for law enforcement purposes. Senator Hart feared that agencies would use that rule to commingle otherwise nonexempt materials with exempt materials in a law enforcement investigatory file and claim protection from disclosure for the whole file. *1975 Source Book* 332-333; see also *Robbins Tire*, 437 U.S. at 227-230. Accordingly, Senator Hart's amendment was intended to require agencies and the courts to look at particular documents and determine whether disclosure would interfere with certain legitimate governmental interests against disclosure. *1975 Source Book* 333. Congress, however, recognized the need to continue "to protect Federal Bureau of Investigation records, Central Intelligence Agency records, and the files of other Federal law enforcement agencies." *Freedom of Information Act Amendments of 1974 (P.L. 93-502): A History of the Legislative Proceedings, Prepared by the Congressional Research Service, Library of Congress, reprinted in 1975 Source Book* 107, 116; see also *Irons* v. *Bell*, 596 F.2d 468 (1st Cir. 1979) (all investigative files of a law enforcement agency satisfy the "for law enforcement purposes" requirement of Exemption 7).

Congress's intent to prevent "commingling" and withholding of documents that it had not intended to be protected by Exemption 7 was accomplished by two

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U.S. 993 (1974); *Aspin* v. *Department of Defense*, 491 F.2d 24 (D.C. Cir. 1973); *Ditlow* v. *Brinegar*, 494 F.2d 1073 (D.C. Cir. 1974); and *Center for National Policy Review on Race & Urban Issues* v. *Weinberger*, 502 F.2d 370 (D.C. Cir. 1974).

changes to Exemption 7. The description of the exempted materials was changed from "investigatory *files* compiled for law enforcement purposes" (5 U.S.C. 552(b)(7) (1970) (emphasis added)) to "investigatory *records* compiled for law enforcement purposes" (5 U.S.C. 552(b)(7) (1982) (emphasis added)). In addition, the amendment changed the status of having been "compiled for law enforcement purposes" from a *sufficient* condition for withholding to a *necessary* condition by adding the further requirement that the records meet one of the six specific criteria in subsections (A)-(F). See *Robbins Tire*, 437 U.S. at 221-222, 229-230, 235; *New England Medical Center Hospital* v. *NLRB*, 548 F.2d 377, 386 (1st Cir. 1976). Those two changes required agencies and courts to consider the nature of each particular document as to which the exemption was claimed and the reasons why withholding that document would be in accord with the balance between disclosure and protecting the needs of the government that FOIA was intended to accomplish. See *Robbins Tire*, 437 U.S. at 229-230. Such an inquiry would prevent the "commingling" that Senator Hart and others feared would be possible after the District of Columbia Circuit decisions. Proponents of the amendment, however, were emphatic in declaring that the amendment was not intended to undercut the original intent of Exemption 7 to "meet legitimate law enforcement concerns." *1975 Source Book* 350. Indeed, with reference to Exemption 7(A), the subsection at issue here, Senator Hart stated that under the new amendment, the exemption

> would apply whenever the Government's case in court—a concrete prospective law enforcement proceeding—would be harmed by the premature release of evidence or information not in the possession of known or potential defendants. This would apply also

> where the agency could show that the disclosure of the information would substantially harm such proceedings by impeding any necessary investigation before the proceeding.

1975 Source Book 333.

The court of appeals thought it "obvious" from the foregoing history that the "intent of the 1974 amendments" would forbid any "attempt * * * to withhold documents generated in the course of routine audits because they are now part of an investigatory file." Pet. App. 8a. But that conclusion, far from being obvious, is most assuredly wrong. The legislative history of the 1974 amendments says nothing about limiting Exemption 7 to those documents *originating* as law enforcement records. Congress chose a very different means to deal with the problem of commingling of documents that should be protected and documents that should not:

> Congress amended Exemption 7 in 1974 because it was concerned that records or information tucked away in investigative files would be withheld pursuant to Exemption 7 without requiring an agency to demonstrate that a particular document's disclosure could result in one of the harms enumerated in Exemption 7. The placement of a record or other information in a larger compilation of records or information gathered for a law enforcement purpose in no way precludes an agency from having to link the disclosure of each record or piece of information placed in the file to one of the six harms specified in Exemption 7.

Crowell & Moring, 703 F. Supp. at 1010. In other words, construing "compiled" to mean "compiled" rather than "originally compiled" poses no danger whatever to the interests Congress sought to protect in the 1974 amendments to Exemption 7, and honors Congress's concomitant intent to preserve the basic purposes of that exemption.

"When Congress adopted the 1974 amendments it neither altered the threshold phrase 'compiled for law enforcement purposes' nor indicated that it intended to modify those decisions * * * which treated the phrase as a broad, descriptive classification, the use of which was largely determined by the agency in question." *Williams* v. *FBI*, 730 F.2d 882, 884 (2d Cir. 1984). As the above summary shows, the 1974 amendments were intended to make agencies and courts engage in a more particularized consideration of the specific documents at issue in light of the purposes of that exemption. The 1974 amendments "explicitly enumerate the purposes and objectives of the Exemption, and thus require reviewing courts to 'loo[k] to the reasons' for allowing withholding of investigatory files before making their decisions. [*1975 Source Book*] 334." *Robbins Tire*, 437 U.S. at 230. In contrast to that intent, the court of appeals here adopted a "wooden[] and mechanical[]" rule, *1975 Source Book* 335, prescribing a broad categorical determination based on how the documents were originally obtained by the governmental agency and wholly unrelated to whether protection of the particular documents from disclosure would be in accord with the objectives of Exemption 7. See *Gould*, 688 F. Supp. at 701.

Nothing in the legislative history supports the idea that withholding under Exemption 7 should turn on the reason

the government originally obtained the information. Instead, the point of the 1974 amendments was to make agencies and courts focus on whether release of the particular documents at issue would impinge on the specified interests sought to be protected by Exemption 7—an inquiry wholly unrelated to the reason why the information was originally obtained by the government. See *Gould*, 688 F. Supp. at 701. As the district court stated in *Fedders Corp.* v. *FTC*, 494 F. Supp. at 328, in rejecting the position adopted by the court of appeals in this case: to "exclude * * * documents from the scope of Exemption 7(A) simply because of the manner in which they were received, and despite the fact that they were, at the time requested, an important element in the record of an active investigation, would be to exalt form over substance and to defeat the purpose for which the [1974] amendment was enacted."

The court of appeals endeavored to justify its misreading of the legislative history on the basis that reading "compiled" to mean "originally compiled" would serve Congress's objective—if not the letter—of the 1974 amendments. There is, however, no reason to think that the rule fashioned by the court of appeals would achieve that result. The problem with allowing agencies to commingle information and withhold too much information is that such withholding is unnecessary to protect the interests that Exemption 7 was intended to protect. The rule fashioned by the court of appeals—basing the disclosure determination on the reason for which the information was originally obtained by the government—does not address that problem. But, even if the rule established by the court of appeals would tend to result in less wrongful withholding, it is not consistent with the method that Congress prescribed to achieve its objective and is vastly overbroad. The court of appeals has imposed an artificial

distinction among records or information—unauthorized by Congress—that would require agencies to segregate out records or information originally obtained for non-law-enforcement purposes and to release those materials no matter how adversely such disclosure would affect ongoing law enforcement. That procedure is wholly different from and inconsistent with the congressional directive that agencies and courts view materials with reference to the six criteria that Congress enacted and by which Congress believed that agencies and courts could properly evaluate whether release of the information would harm the interests Congress sought to protect.

In essence, the court of appeals simply concluded that reading "compiled" to mean "originally compiled" will serve Congress's objective of preventing withholding by commingling and therefore must be the proper interpretation of the statute. "But no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987). Here, Congress did not merely prohibit exemption by commingling; it also indicated the criteria by which records qualifying for the exemption are to be differentiated from the commingled records that do not qualify—criteria that differ substantially from the broad-brush approach of the court of appeals.

Furthermore, although this case involves Exemption 7(A), the rule established by the court of appeals would have broader implications because the court's ruling construes the threshold requirement to all of Exemption 7.

Thus, it would prevent the government from invoking the protections provided by other subsections of Exemption 7, including the protection of confidential informants, the privacy of innocent individuals named in law enforcement records, and the protection of the lives and physical safety of law enforcement officers or others identified in such records, solely because of the reasons for which the information was originally obtained by the government. Such a rule is totally at odds with the substantive intent of the 1974 amendments to Exemption 7, for it would require federal agencies to segregate and disclose information and records even though those records or information were, at the time of the required disclosure, an integral part of a legitimate, ongoing criminal (or other law enforcement) investigation and the disclosure would violate the very interests that Congress enumerated in the 1974 amendments. The severe harm that such a rule would cause to federal law enforcement interests is manifest and wholly contrary to Congress's intent.

C. A Rule Limiting Exemption 7 To Documents Originally Obtained Or Generated For Law Enforcement Purposes Would Be Inconsistent With The Purposes Of Exemption 7

The court of appeals acknowledged that its opinion would lead to an anomalous result, but the court suggested that the problem was one of Congress's making and that the government should address its concerns to Congress. Pet. App. 8a. But, as we have shown, the problem arises not because of anything Congress did but because of the errors committed by the court of appeals in misreading the plain language of the statute and the legislative history of the 1974 amendments; far from dictating the result reached by the court of appeals, the statute leaves no room

for it. And, even if there were room to read the statute and the legislative history to support the result that the court of appeals reached, it would not follow that the courts are powerless to avoid anomalous results. To the contrary, this Court's Exemption 7 cases teach that any ambiguity in that exemption should be resolved in favor of sensible results that comport with the underlying purposes of FOIA's basic disclosure mandate and the exceptions to that mandate. See *United States Department of Justice* v. *Reporters Committee for Freedom of the Press, supra; NLRB* v. *Robbins Tire & Rubber Co., supra; FBI* v. *Abramson, supra.*

This Court has consistently taken a practical approach to interpreting FOIA in an effort to apply a workable statutory balance between the interests of the public in greater access to information and the needs of the government in protecting certain kinds of information from disclosure. See, *e.g., EPA* v. *Mink*, 410 U.S. 73, 80 (1973); *Department of the Air Force* v. *Rose*, 425 U.S. 352, 361-362 (1976); *Baldrige* v. *Shapiro*, 455 U.S. 345, 352 (1982). In accord with that approach, the Court looks to the reasons for exemption from FOIA's mandatory disclosure requirements in determining whether the government has properly invoked a particular exemption. See, *e.g., NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 148-154 (1975); *FBI* v. *Abramson*, 456 U.S. at 630.

In applying Exemption 7, this Court has looked carefully at the effect that disclosure would have on the interests that exemption seeks to protect. In *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. at 242-243, the Court held that Congress did not "intend[] to overturn the NLRB's longstanding rule against prehearing disclosure of witness statements * * * [and that] the Court of Appeals erred in holding that the Board was not entitled to withhold such statements under Exemption 7(A)." In reaching that

result, this Court canvassed the legislative history of the exemption (437 U.S. at 224-236) and concluded that the key determination it must make in ruling on an Exemption 7 claim is whether release of particular kinds of records would contravene any of the six criteria listed in Exemption 7. 437 U.S. at 235-236. The approach taken by the court of appeals in this case—applying a categorical rule that is unrelated to the purpose of Exemption 7—is directly contrary to that approach.

The decision of the court of appeals is even more at odds with *FBI* v. *Abramson, supra.* The issue in that case was whether information originally compiled for law enforcement purposes and meeting the other criteria of Exemption 7 lost its exempt status when it was recompiled for non-law-enforcement purposes. In answering that question, the Court reasoned it must look to "the intention of Congress, • • • the structure of the Act, and • • • the purposes of the statute" (456 U.S. at 625) because the statutory language and the legislative history were ambiguous on the question that the Court had to decide. Although here the statutory language and legislative history are themselves unambiguous and dispositive, the *Abramson* analysis provides further support for reversal of the decision of the court of appeals.

In looking for guides to Congress's intent, the Court in *Abramson,* 456 U.S. at 627-628, specifically ruled that "[t]he enumeration of [six] categories of undesirable consequences [in Exemption 7] indicates [that] Congress believed the harm of disclosing this type of information would outweigh its benefits." The Court found "nothing to suggest, and no reason for believing, that Congress would have preferred a different outcome simply because the information is now reproduced in a non-law-enforcement record." *Id.* at 628.

Contrary to the approach of the court of appeals in this case, the rationale of *Abramson* indicates that "compiled for law enforcement purposes" is not to be construed as a high, or highly technical, barrier to claims of exemption. Rather, in light of the 1974 amendments, the emphasis should be placed on the six criteria that Congress specified as justifying withholding. See also *United States Department of State* v. *Washington Post Co.,* 456 U.S. 595 (1982) (rejecting highly technical and formalistic construction of "similar files" threshold criterion of Exemption 6, 5 U.S.C. 552(b)(6), and emphasizing the need for courts to conduct the substantive task of balancing the public interest in disclosure that FOIA was designed to promote against the interests that the exemption was designed to protect). The requirement that records or information be "compiled for law enforcement purposes" is not meaningless, but neither is it to be construed in a restrictive or non-functional way. *Abramson* teaches that "[i]t is • • • critical that the compiled-for-law-enforcement requirement be construed to avoid the release of information that would produce the undesirable results specified [in the six criteria listed in the exemption]." 456 U.S. at 630. Thus, to the extent that there may be ambiguity in the "compiled for law enforcement purposes" requirement, it should be resolved in favor of deeming a particular record to be a law enforcement record and disclosing it or not disclosing it depending on the application of subsections (A)-(F) of Exemption 7. The court of appeals accordingly erred in failing to follow the rationale of *Abramson.*

The incompatibility between the purposes underlying Exemption 7 and the rule adopted by the court of appeals is further shown by the 1986 amendments to Exemption 7, which reflect basically the same practical approach applied by this Court in *Abramson.* The 1974 amendments

had made Exemption 7 applicable to "investigatory records compiled for law enforcement purposes." 5 U.S.C. 552(b)(7) (1982). In 1986, Congress amended Exemption 7 to delete the word "investigatory" and add the words "or information," so as to extend Exemption 7's protections to "records or information compiled for law enforcement purposes." Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, Subtit. N, § 1802, 100 Stat. 3207-48.

The 1986 amendments were "intended to broaden the reach of this exemption and to ease considerably a Federal law enforcement agency's burden in invoking it," *Reporters Committee*, slip op. 6 n.9 (quoting 132 Cong. Rec. S16,504 (daily ed. Oct. 15, 1986) (statement of Sen. Hatch)),[9] and "to ensure that sensitive law enforcement information is protected under Exemption 7 regardless of the particular format or record in which [it] is maintained." S. Rep. No. 221, 98th Cong., 1st Sess. 23 (1983) (citing *Abramson* twice with apparent approval).[10] See *Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act* 5-9 (1987). The ruling of the court of appeals is directly contrary to the congressional intent expressed in the 1986 amendments: it

[9] See also *Irons* v. *FBI*, 811 F.2d 681, 687 (1st Cir. 1987); *Curran* v. *Department of Justice*, 813 F.2d 473, 474, n.1 (1st Cir. 1987) (the "drift" of the 1986 amendments is "to ease—rather than to increase—the government's burden in respect to Exemption 7(A)").

[10] This report, which concerned a predecessor bill to what eventually became the 1986 amendments to Exemption 7, is recognized as authoritative concerning the meaning of those amendments. See *Reporters Committee*, slip op. 28 n.22; *King* v. *Department of Justice*, 830 F.2d 210, 229 n.141 (D.C. Cir. 1987); 132 Cong. Rec. S14,296 (daily ed. Sept. 30, 1986) (statement of Sen Leahy) (Senate Report 98-221 "sets out the legislative history which should be consulted to determine the scope of the section we are adopting in this bill").

would make it much harder for federal agencies to invoke Exemption 7; it fails to focus on whether release of particular information would harm the interests sought to be protected by the exemption; and it would incapacitate agencies from protecting the legitimate needs of law enforcement solely because of the manner in which the information was originally obtained.

Finally, it is noteworthy how very far removed the present disclosure request lies from the purposes for which Congress enacted FOIA. This Court recently issued an emphatic reminder that "[the] basic policy of full agency disclosure unless information is exempted under clearly delineated statutory language • • • focuses on the citizens' right to be informed about what their government is up to." *Reporters Committee*, slip op. 23 (citations and internal quotation marks omitted). The request in this case involves no such noble purpose, but rather the very kind of "meddling" in a grand jury proceeding that Justice Stevens condemned in his concurring opinion in *Robbins Tire*, 437 U.S. at 243. In the absence of statutory language compelling that result, there is no reason why a court should allow such meddling. And, we submit, the language of Exemption 7 actually *refutes* the decision of the court of appeals to base FOIA determinations on a wholly nonsubstantive distinction between documents that originate as law enforcement records and those that are only later compiled for law enforcement purposes. That distinction serves no purpose that Congress articulated or could conceivably have had in mind in 1966, in 1974, or in 1986. It should be rejected.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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RESPONDENT'S

BRIEF

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No. 88-1083

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1988

JOHN DOE AGENCY AND JOHN DOE GOVERNMENT AGENCY,

Petitioners,

v.

JOHN DOE CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the court of appeals correctly decided that agency records, compiled for a non-law-enforcement purpose in the course of the agency's routine monitoring of a government contractor's accounting procedures, may not be withheld under FOIA Exemption 7, 5 U.S.C. § 552(b)(7) (1982 & Supp. V 1987), merely because such records are transferred to the custody of the FBI following denial of the contractor's FOIA request.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

At issue in this Freedom of Information Act ("FOIA") case are documents relating to a 1978 exchange of letters between John Doe Corporation (the "Corporation"), a defense contractor, and the Defense Contract Audit Agency ("DCAA"),[1] the accounting branch of the Department of Defense. A panel of the United States Court of Appeals for the Second Circuit (Lumbard, Meskill

[1] The DCAA is identified in the caption as the John Doe Agency. The Federal Bureau of Investigation ("FBI") is identified in the caption as the John Doe Government Agency. The Government has indicated that it does not object to the identification of the John Doe Agencies, Pet. Br. II, and such identification clarifies the facts without compromising the purpose of the sealing order. John Doe Corporation is a pseudonym for a private corporation identified in materials filed under seal in the court of appeals. Because Respondent is referred to as John Doe Corporation in all submissions to this Court, and the record below is under seal, the Corporation has not submitted a Rule 28.1 listing of corporate affiliations. The record below contains such a disclosure.

and Winter, Circuit Judges) unanimously decided that the documents in question did not constitute "records or information compiled for law enforcement purposes" under FOIA subsection 552(b)(7) ("Exemption 7"). Pet. App. 7a. As explained in Circuit Judge Winter's opinion for the court:

> In the instant case, the documents requested were generated by Agency independent of any investigation in the course of its routine monitoring of Corporation's accounting procedures with regard to Corporation's defense contracts. The records were compiled in 1978, seven years before the investigation began in 1985. They were thus not "compiled for law enforcement purposes" and are not exempt by Subsection (b)(7).

Pet. App. 7a.

The court of appeals also held that the attempt to withhold the documents by transferring them to the FBI "contravenes the obvious intent of the 1974 amendments to FOIA." Pet. App. 8a (citation omitted). As Judge Winter's opinion further explains:

> The 1974 amendments to the FOIA make it clear that a governmental entity cannot withhold materials requested under the FOIA on the ground that materials that were not investigatory records when compiled have since acquired investigative significance. Originally, the FOIA exemption in question applied to "investigatory files." In 1974, however, Congress substituted the word "records" for "files" to insure that documents produced in the routine course of government operations would not be withheld under Subsection (b)(7) merely because they had been commingled with investigative materials generated later in the course of a law enforcement proceeding.

Id. at 7a-8a (citations omitted).

The Government's brief does not deal fairly with the court of appeals' decision or the issue before this Court. The facts are undisputed that the requested DCAA accounting records had no law enforcement purpose when they were generated in 1978, had never been used for law enforcement purposes when they were requested from DCAA by the Corporation in 1986, and were not transferred to the FBI until after the Corporation's FOIA request was denied. There is no factual support for the Government's argument that the records were subsequently "recompiled" by the FBI, there is no such finding in the district court's Memorandum of Decision and Order, and the court of appeals did not rule that records "originally compiled" for non-law-enforcement purposes may not subsequently be "recompiled" for law enforcement purposes. Since that is the only issue raised by the Government before this Court, Respondent respectfully suggests that the writ of certiorari was improvidently granted.

The issue raised by the actual facts in this case is whether non-exempt records could be withheld under Exemption 7 by the expedient of transferring the folders in which the records were contained to the possession of the FBI following denial of a request for the records by the DCAA. The court of appeals' rejection of the Government's position on this issue, as this brief will demonstrate, is entirely consistent with the language of Exemption 7, its legislative history and prior decisions of this Court.

A. Statement of the Facts

The Government's brief omits or fails to emphasize a number of critical facts.

The Corporation as a defense contractor is subject to periodic, routine audits by the Defense Contract Audit Agency. *See* 32 C.F.R. § 357.2 (DCAA Mission), § 357.4 (Responsibilities and Functions). During 1978, in connection with such an audit, there was an exchange of correspondence between the Resident Auditor of the DCAA and the Corporation concerning the appropriate accounting treatment of costs for a software development facility. In a May 2, 1978 letter, the DCAA Resident Auditor contended that the Corporation's software development costs should have been charged directly to certain government contracts. J.A. 22. In a July 11, 1978 letter, the Corporation submitted a detailed response justifying the charging of such costs to a technical overhead account to which other computer costs had

been consistently charged. J.A. 23-28. Since the DCAA then dropped the matter, the Corporation assumes that the requested DCAA records will show that the Agency approved the Corporation's position.

The Corporation's FOIA request to the DCAA was filed on September 30, 1986 and requested any DCAA documents relating to the subject matter of the DCAA's 1978 correspondence with the Corporation. J.A. 19-21. DCAA, in a response to the request on November 4, 1986, stated that more time was needed to collect and evaluate the documents because the correspondence had been written more than eight years before. J.A. 73. Some two weeks later, on November 18, 1986, DCAA denied the request under FOIA subsections 552(b)(7)(A) and (E).[2] J.A. 29-30. The denial states that it is "upon the advice and direction" of an identified Assistant United States Attorney and contains no other justification. J.A. 29. On November 20, 1986, two days after the DCAA's decision, two file folders of documents responsive to the FOIA request were removed from the DCAA by agents of the FBI and transferred to the custody of the FBI. J.A. 47, 92.[3]

[2] The referenced FOIA provisions permit the withholding of "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings. . .[or] (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law. . . ." 5 U.S.C. § 552(b)(7)(A) and (E) (1982 & Supp. V 1987).

[3] In an October 19, 1987 district court affidavit, the Assistant United States Attorney in charge of the investigation represented that he had been "advised that the requested documents were taken by the FBI prior to [Corporation's] original Freedom of Information Act request to DCAA." C.A. App. 76; *see* J.A. 60-61. This information, however, was false and has been corrected in an affidavit by a Department of Justice attorney filed with the December 15, 1988 motion in the court of appeals for a stay pending application for certiorari. The subsequent affidavit states that "[o]n November 20, 1986, the requested records were transferred from John Doe Agency [DCAA] to John Doe Government Agency [FBI]." J.A. 92.

B. Proceedings Below

1. The District Court Proceedings

On July 22, 1987, having exhausted its administrative remedies, the Corporation filed a complaint in the United States District Court for the Eastern District of New York seeking review of the DCAA's and FBI's withholding of the requested DCAA documents. J.A. 11-14. On September 28, 1987 the Corporation moved to compel the preparation of a *Vaughn* index.[4] J.A. 67; Pet. App. 3a. The Corporation also served interrogatories seeking information about DCAA's search for documents responsive to the request and the transfer of the DCAA records to the FBI. J.A. 55-59; Pet. App. 3a-4a.

In response, the Government moved for a protective order to stay preparation of the *Vaughn* index and answers to interrogatories until the Government prepared a summary judgment motion. J.A. 68-69; Pet. App. 4a. An October 19, 1987 affidavit of an Assistant United States Attorney in support of the Government's motion stated that "[t]hese documents, *compiled by DCAA*, concern the review and analysis by DCAA of [Corporation's] charging practices on certain defense contracts. . . ." C.A. App. 76; *see* J.A. 61 (emphasis added). There is no allegation in this affidavit or any subsequent affidavit that the documents were subsequently "recompiled" by the FBI. *Id.*

On December 14, 1987 the district court ordered the DCAA and FBI to prepare a *Vaughn* index and answers to the Corporation's interrogatories, but directed, *sua sponte*, that they be filed with the court for *in camera* inspection. J.A. 62-65. On March 28, 1988, without any hearing or other proceedings, the district court (Mishler, J.) issued a Memorandum of Decision and Order dismissing the complaint. In so ruling, the court stated that it had reviewed the *Vaughn* index and answers to the interrogatories and determined that:

[4] A *Vaughn* index is an affidavit identifying the nature and subject matter of documents withheld and explaining the reasons for non-disclosure. *See Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). Its purpose is to permit "the court system effectively and efficiently to evaluate the factual nature of disputed information." *Id.* at 826.

> [T]here is a substantial risk that disclosure of any of this material, the documents, the *Vaughn* index and the answers to [John Doe Corporation's] interrogatories, would jeopardize the grand jury proceeding. *See Hatcher v. U.S. Postal Service*, 556 F. Supp. 331, 334 (D.D.C. 1982). Defendants are not required to turn over any of these documents to the plaintiff.

Pet. App. 14a. The Memorandum contains no further explanation of the district court's decision.

2. Proceedings In The Court of Appeals

On June 23, 1988, following an appeal by the Corporation, the United States Court of Appeals for the Second Circuit reversed the district court's order. Pet. App. 1a-4a. The court of appeals' opinion deals separately with each of the issues involved in the district court's rejection of the Corporation's claims: (a) the release of the documents sought; (b) the release of the Government's *Vaughn* index; and (c) the release of the Government's answers to the Corporation's interrogatories.

a. The Documents

With respect to the documents, the court of appeals held that the documents were not exempt from disclosure under FOIA Exemption 7 or under Fed. R. Crim. P. 6(e), which the court held was incorporated in FOIA Exemption 3.[5] Pet. App. 6a-9a. As already noted, the court of appeals determined that Exemption 7 was unavailable because the documents were generated by the DCAA "independent of any investigation in the course of its routine monitoring of Corporation's accounting procedures" and were not "compiled for law enforcement purposes." Pet. App. 7a. With respect to the prohibitions of Rule 6(e) on the disclosure of matters occurring before a grand jury, the sole basis for the district court's decision, the court of appeals held that the Government defendants "have simply failed to demonstrate 'a nexus between disclosure and revelation of a protected aspect of the grand jury's investigation.'" Pet. App. 9a (citing *Senate of the Commonwealth*

[5] Exemption 3 relates to matters that are "specifically exempted from disclosure by statute. . . ." 5 U.S.C. § 552(b)(3) (1982 & Supp. V 1987).

of Puerto Rico v. United States Department of Justice, 823 F.2d 574, 584 (D.C. Cir. 1987)). The court explained that "[a] document that is otherwise available to the public does not become confidential simply because it is before a grand jury," and that there must be a showing that disclosure "will result in exposure of some other aspect of the grand jury proceeding that is secret." *Id.* The court concluded that "[n]o such showing has been made in the instant case." *Id.*[6]

b. The *Vaughn* Index

With respect to the *Vaughn* index, the court of appeals' opinion makes clear that the court did not decide "the precise circumstances in which a *Vaughn* index may be withheld from the party seeking the documents," but only that the justification proferred by the Government for withholding the index in this case "is clearly without merit." Pet. App. 10a. The court explained that: "If the exemption in Subsection (b)(7) does not protect the documents themselves, disclosure of the *Vaughn* index can hardly be said to trench upon legitimate secrecy interests." *Id.* The court of appeals noted that *in camera* review of a *Vaughn* index "is unusual, and differs significantly from *in camera* review of the actual requested documents, a procedure expressly authorized by the FOIA." Pet. App. 10a (citing 5 U.S.C. § 552(a)(4)(B)). The court of appeals also noted that *in camera* review of a *Vaughn* index is generally "limited to cases implicating national security interests." *Id.* (citing cases). Finally, the court noted that without access to a *Vaughn* index or answers to interrogatories, a FOIA requester is "unable to mount a complete adversary argument." *Id.*

c. Interrogatory Answers

The court of appeals' decision stated that "[s]o far as the interrogatory answers are concerned, we have found nothing justifying the wholesale claim of a need for secrecy." Pet. App. 10a. Nevertheless, the court of appeals held that the Government on

[6] The court of appeals' decision precluded the Government from continuing to resist release of the DCAA documents based on FOIA Exemption 7 or Fed. R. Crim. P. 6(e), but allowed the district court on remand to consider any other exemptions claimed by the Government. Pet. App. 11a.

remand should be allowed to bring to the district court's attention "any particular matter that would, if disclosed, expose some secret aspect of the grand jury's investigation." *Id.*

3. Subsequent Proceedings

The Government filed a petition for rehearing or rehearing *en banc* of the court of appeals' decision which was denied on November 8, 1988. Pet. App. 17a. On November 28, 1988, the court of appeals denied the Government's motion for a stay and issued its mandate. Pet. App. 15a-16a. The Solicitor General did not apply to this Court for a stay of the mandate and the case returned to the district court.

On December 7, 1988, following the Government's refusal to release the *Vaughn* index as required by the court of appeals' mandate, the Corporation requested an order from the district court directing release of the *Vaughn* index. The district court issued such a directive, but on December 12, 1988 stayed its order at the request of the Government that it be given another opportunity to request a stay from the court of appeals. J.A. 86-87.

On December 13, 1988, the Government filed a notice of appeal from the district court's order and a second motion for a stay in the court of appeals, which the court of appeals denied on January 10, 1989. J.A. 96. The Government thereupon filed in this Court an application for a recall and stay of the mandate and for a stay of the proceedings below. That same day, the Circuit Justice entered an order granting a temporary stay pending receipt of the Corporation's response. On January 30, 1989, the Circuit Justice granted a full stay pending the disposition of the petition for a writ of certiorari. 109 S.Ct. 852 (1989) (Marshall, J., in chambers). Certiorari was granted on February 21, 1989. J.A. 99; 109 S.Ct. 1116.

SUMMARY OF ARGUMENT

In this FOIA case, the court of appeals ruled that documents relating to a 1978 exchange of letters between the Corporation, a defense contractor, and the Defense Contract Audit Agency

("DCAA"), were generated by the DCAA "independent of any investigation in the course of its routine monitoring of Corporation's accounting procedures" and thus were not "compiled for law enforcement purposes" under FOIA Exemption 7, 5 U.S.C. § 552(b)(7). The court of appeals also held that transfer of custody of the DCAA documents to the FBI did not affect the status of the documents under Exemption 7.

The FOIA contains a strong statutory presumption in favor of disclosure which was reinforced by the 1974 amendments to Exemption 7. Under the plain language of the section, records may not be withheld under Exemption 7 unless the Government meets its burden of proving that the records were "compiled for law enforcement purposes." Here it is clear that the records were compiled by the DCAA for non-law-enforcement purposes some eight years before the Corporation's FOIA request and were in the possession of the DCAA when the Corporation's request was made and denied. While the Government contends that they were thereafter "recompiled" by the FBI for law enforcement purposes, there is no factual basis for this contention and neither the district court nor the court of appeals made any such finding. What the record shows is only that after the DCAA denied the Corporation's FOIA request, the file folders containing responsive documents were transferred from the DCAA to the FBI.

This case, therefore, does not involve the issue raised in several district court decisions as to whether records originally compiled for a non-law-enforcement purpose may subsequently be recompiled for law enforcement purposes. In all of those other cases, the records sought were compiled or recompiled for law enforcement purposes before any FOIA request for disclosure and were part of the impetus for the law enforcement proceedings at issue. There was no showing by the Government in this case that any such recompilations occurred, and no such FBI recompilations, if they exist, were requested by the Corporation. There also was no showing that the requested records were the impetus for any law enforcement proceeding.

The Government's success in promoting this case into a test of whether Exemption 7's threshold requirement can be met by a

recompilation for law enforcement purposes of otherwise non-exempt documents virtually assures that any disclosures in response to the Corporation's FOIA request will be delayed until the disclosures become useless. Essentially the Government is urging the Court to negate Exemption 7's threshold requirement that withheld documents have been "compiled for law enforcement purposes" by requiring a document-by-document determination of whether disclosure of any documents in the custody of the FBI or other law enforcement agencies would trigger one of the dangers set forth in subdivisions (A)-(F) of the exemption. This extreme interpretation of Exemption 7 would assure the same delays in all such cases which have plagued this case.

The Government's construction of Exemption 7 is not consistent with its plain meaning. In *Federal Bureau of Investigation v. Abramson*, 456 U.S. 615 (1982), this Court held that information originally compiled for law enforcement purposes did not lose its Exemption 7 protection if summarized in a new document not created for law enforcement purposes. The converse of this proposition is that information originally compiled for a non-law-enforcement purpose would not gain Exemption 7 protection because it is recompiled at some future date for law enforcement purposes. Under *Abramson*, therefore, the documents compiled by DCAA for non-law-enforcement purposes could not have been withheld under Exemption 7 even if, contrary to the facts, they subsequently had been recompiled by the FBI for law enforcement purposes.

The Government's attempt to fit what happened in this case into the definition of the word "compile" deprives the word of its ordinary meaning. Clearly under *Webster's* definition, to "compile" is not the same as to seize, to transfer, to take custody of, to remove, or to commingle. The transfer of custody of file folders containing a collection of responsive FOIA documents from the DCAA to the FBI is not in any way comparable to the collection and editing of the Holmes-Laski letters or any of the other examples of compilations in the Government's brief. It must be emphasized also that the Corporation has never sought any FBI digests, summaries, analyses, or other edited versions of the DCAA documents, if such exist.

The Government also overlooks the fact that Exemption 7 uses the term "compiled," the past tense of the verb "to compile," which clearly contemplates that whatever compilation is involved already has occurred. This contrasts with the referenced Executive Order under Exemption 1 which provides expressly that information may be "classified or reclassified" after an agency has received a FOIA request. Exemption 7 contains no comparable language of reference. It says "compiled," not "compiled or recompiled" or "originally compiled and later recompiled." Moreover, the threshold test for exemption is given primacy in the structure of Exemption 7 and can be applied generically in cases such as this to preclude the inevitable and interminable delays inherent in the Government's approach.

The legislative history of the 1974 amendments to Exemption 7 confirms the court of appeals' interpretation of its provisions. Even the Government acknowledges that the 1974 amendments were intended to overrule several decisions of the Court of Appeals for the District of Columbia Circuit under which exemption depended on the location of documents in an investigative file and agencies could "commingle otherwise nonexempt materials with exempt materials in a law enforcement investigatory file and claim protection from disclosure for the whole file." What the Government refuses to acknowledge is that this case presents exactly the situation against which the 1974 amendments were directed. As the court of appeals states in its opinion, "the attempt in the instant case to withhold documents generated in the course of routine audits because they are now part of an investigatory file thus contravenes the obvious intent of the 1974 amendments to the FOIA."

At the heart of the Government's resistance to disclosure in this case is its hostility to any access by the Corporation to even the most routine government accounting records relevant to its defense. This hostility is misplaced and, if allowed to influence the interpretation of Exemption 7, will lead inevitably to a repetition of the fiasco experienced by the Government in the *General Dynamics* case as a result of similar resistance and delay in disclosing under the FOIA the accounting records at issue there. The court of appeals properly noted that "the motive for an FOIA

request is not relevant to whether the information must be disclosed" and that the "fact that the Corporation is under investigation does not alter... the requestor's FOIA rights." The Act must be construed in accordance with its plain language, its objectives and the facts in this case, without the suggested hostility towards the Corporation's purposes. The Act was so construed by the court of appeals and its judgment, therefore, should be affirmed.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY DECIDED THAT THE REQUESTED DCAA ACCOUNTING RECORDS WERE NOT COMPILED FOR LAW ENFORCEMENT PURPOSES UNDER FOIA EXEMPTION 7

A. The DCAA Records Were Not Compiled For Law Enforcement Purposes

The Freedom of Information Act, as the Government acknowledges, provides for "broad disclosure of government documents." Pet. Br. 13; *see Dep't of Air Force v. Rose,* 425 U.S. 352, 361 (1976) ("[T]hese limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act"). In harmony with this objective, there is a presumption under the Act that requested records or information should be disclosed and the burden is on the Government to justify any withholding. *See* 5 U.S.C. § 552(a)(4)(B) ("the burden is on the agency to sustain its action" of withholding documents). "It is clear from the language of the statute, and the Congressional persistence in amending statutory language to overturn overly restrictive judicial interpretations, that FOIA compels disclosure in every case where the government does not carry its burden of convincing the court that one of the statutory exceptions apply." *Goldberg v. United States Dep't. of State,* 818 F.2d 71, 76 (D.C. Cir. 1987) (footnote omitted), *cert. denied,* __U.S.___, 108 S.Ct. 1075 (1988).

The Government's invocation of Exemption 7 as a bar to disclosure in this case triggers a "two-part inquiry." *Federal*

Bureau of Investigation v. Abramson, 456 U.S. 615, 622 (1982). "First, a requested document must be shown to have been an investigatory[7] record 'compiled for law enforcement purposes.' If so, the agency must demonstrate that release of the material would have one of the six results specified in the Act." *Id.* (footnote added). Unless the Government can meet the threshold requirement by demonstrating that the DCAA records were "compiled for law enforcement purposes," the records cannot be withheld under Exemption 7. *Id.*

As explained in the Statement of Facts, the affidavit submitted by the Government in the district court asserted that the records were "compiled by the DCAA" and even the Government concedes, as the court of appeals concluded, that they were not compiled by the DCAA for law enforcement purposes.[8] Pet. Br. 3.

The court of appeals had no occasion to rule in this case on whether records "originally compiled" for non-law-enforcement

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[7] In 1986, Congress amended the language of the threshold inquiry of Exemption 7 from "investigatory records compiled for law enforcement purposes" to "information or records compiled for law enforcement purposes." Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, Subtitle N, § 1802, 100 Stat. 3207-48. The purpose of this change was to ensure that items such as internal law enforcement manuals would be exempt from disclosure even if not "investigatory" in nature. It is clear, however, that the 1986 amendment to Exemption 7 "does not affect the threshold question of whether records or information withheld under (b)(7) were 'compiled for law enforcement purposes.'" *King v. United States Department of Justice,* 830 F.2d 210, 229 n.141 (D.C. Cir. 1987) (citing and recounting legislative adoption of Senate Judiciary Committee Report No. 221, 98th Cong. 1st Sess. 23 (1983), *reprinted in relevant part in,* 132 Cong. Rec. H.9466 (Daily ed. October 8, 1986)).

[8] The district court's conclusion that disclosure of the documents "would jeopardize the grand jury proceeding" purported to be based on *Hatcher v. United States Postal Service,* 556 F. Supp. 331 (D.D.C. 1982). In *Hatcher,* however, the withheld documents were "created during" the criminal investigation and included such materials as witness interviews and the agents' notes on the case. No such documents are sought in this case. Moreover, in *Hatcher,* the district court ordered the release of records "created prior to or independent of the investigation ... through routine agency program administration." *Id.* at 334. As the court of appeals opinion indicates, this characterization of the documents released in *Hatcher* exactly describes the documents requested and withheld in this case.

purposes but later recompiled for law enforcement purposes could meet the threshold requirement of Exemption 7. What the court of appeals did hold, as Judge Winter's opinion clearly states, is that "merely because they [the non-law-enforcement documents] had been commingled with investigative materials" did not convert the documents into records compiled for law enforcement purposes. Pet. App. 8a (citations omitted).[9] Despite the harsh criticism leveled at the opinion by the Government, no other result was possible based on the facts of this case.

B. The Government Has Made No Showing That The Records Compiled By The DCAA Were Subsequently Recompiled By The FBI

The Government's brief on the merits in the court of appeals did not argue that any of the requested DCAA documents were "compiled" by the FBI at any time prior to or subsequent to the Corporation's request for their disclosure. The Government's argument in the court of appeals was that the grand jury's possession of the documents was a sufficiently compelling reason for barring disclosure[10] and that the district court's "protective" order was not subject to review. Brief for the Defendants-Appellees at

[9] From what appears in the public record, the DCAA file folders containing records responsive to the request simply were transferred intact from the DCAA to the FBI following the Agency's denial of the FOIA request. J.A. 47. Neither the *Vaughn* index nor the Answers to Interrogatories have been disclosed to the Corporation and the Corporation, therefore, does not know if they provide any basis for any suggestion that the records actually were "commingled."

[10] Despite some favorable references in the Government's brief to the district court's opinion, neither the Government's brief nor its petition for certiorari challenges the ruling of the court of appeals that the DCAA documents are not exempt from disclosure pursuant to Fed. R. Crim. P. 6(e). As the court of appeals explained, absent a showing that disclosure would expose some aspect of the grand jury proceeding that is secret, a "document that is otherwise available to the public does not become confidential simply because it is before a grand jury." Pet. App. 9a; *see also Washington Post Company v. United States Department of Justice*, 863 F. 2d 96, 100 (D.C. Cir. 1988) ("The relevant inquiry is whether the document would reveal the inner workings of the grand jury, such as witness names, or the substance of testimony or the direction and strategy of the investigation. Moreover, the document itself must reveal the inner workings; the Government cannot immunize a document by publicizing the link.") (citations omitted).

15, 19-22, *John Doe Corp. v. John Doe Agency*, 850 F.2d 105 (2d Cir. 1988) (No. 88-1083), *opinion reprinted in* Pet. App. 1a-11a. The October 19, 1987 affidavit submitted by the prosecutor to the district court in support of the Government's motion for a protective order likewise does not suggest that the FBI "compiled" the documents for law enforcement purposes. On the contrary, it states flatly that the documents were "compiled by DCAA," C.A. App. 76; *see* J.A. 61, and nowhere suggests that they were thereafter recompiled by the FBI. Even at this stage, no factual underpinning is provided in the Government's brief for the repeated assertions in its argument that the records were recompiled by the FBI. The Government's own statement of facts recites only that the "requested records were transferred from John Doe Agency [DCAA] to John Doe Government Agency [FBI], a federal law enforcement agency." Pet. Br. 5; J.A. 92.

C. The Cases Relied On By The Government, Unlike This Case, Involve Records Compiled For Law Enforcement Purposes Prior To Any FOIA Request And Thus Are Inapposite

The issue sought to be raised by the Government in this case has been the subject of several district court opinions. In contrast to this case, these other decisions involve agency documents which had been compiled for law enforcement purposes before any FOIA request for their disclosure. None involve the withholding of clearly non-exempt documents sitting in dead storage for eight years because of their transfer to the FBI after a FOIA request is denied.

Crowell & Moring v. Department of Defense, 703 F. Supp. 1004 (D.D.C. 1989), is illustrative of the striking differences between he facts in this case and the facts in cases involving the Government's issue. The FOIA demand in *Crowell & Moring* was for an agency's solicitation and bidding records concerning the sale of surplus explosives. *Id.* at 1005. The agency responded by disclosing "those documents in its possession that were responsive to plaintiff's request. . . ." *Id.* The issue in the case was whether other responsive documents which had been forwarded by the

agency to the Defense Criminal Investigative Service ("DCIS") because of suspected criminal conduct *prior* to any FOIA demand also had to be disclosed. *Id.* Crowell & Moring contended that the original purpose for which records are generated or created determined their status under Exemption 7, while DCIS contended that Exemption 7 protection hinged on the context in which the records are currently being used. No one contended that the status of the records under Exemption 7 depended in any way on what became of the records after the FOIA request was made and rejected.

The district court ruled in *Crowell & Moring*, as have other lower courts on similar facts, that records originally generated or created for a non-law-enforcement purpose may thereafter be recompiled for a law enforcement purpose within Exemption 7. In each of these cases, the documents withheld were part of the impetus for the law enforcement proceedings and were being utilized for law enforcement purposes at the time their release was requested. In *Crowell & Moring*, the Government contended that "no written records were made until the commencement of an actual investigation of criminal activity." *Id.* at 1007 (footnote omitted). In *Gould, Inc. v. GSA*, 688 F. Supp. 689 (D.D.C. 1988), "prior to Gould's filing of its . . . FOIA request with GSA," the requested audit reports had been submitted to the Inspector General's Field Office of Investigations and were "the subject of a current investigation being conducted jointly by the Office of Investigations and the United States Attorneys' Office in San Francisco." 688 F. Supp. at 692. In *Raytheon Co. v. United States Dep't of the Navy*, Civ. No. 88-94, slip op. (D.D.C. Jan 5, 1989), the court found that the documents "as they existed at the time of the FOIA request, were compiled for purposes of a pending law enforcement investigation. . . ." *Id.* at 9. In *Fedders Corp. v. FTC*, 494 F. Supp 325 (S.D.N.Y.), *aff'd mem.*, 646 F.2d 560 (2d Cir. 1980), the FTC documents sought, such as complaint letters and reports of staff interviews, were the basis of or were created in the course of several ongoing investigations. This is not the situation here. The DCAA records at issue here were not being used for law enforcement purposes when the Corporation made its FOIA

request (or when the request was denied) and were in no sense the impetus for any law enforcement proceedings.

Other lower court decisions have reached the conclusion that records generated in the course of routine government operations maintain their non-exempt status even if they are recompiled for a law enforcement purpose prior to the FOIA demand.[11] But it must be stressed that neither line of cases has any bearing on whether Exemption 7 is applicable to records seized by the FBI after a FOIA request is denied. As the district court stated in *Crowell & Moring*: "[t]o prevent a 'stone wall' blocking disclosure, Congress amended Exemption 7 so as to require an agency to demonstrate that each record or piece of information within the file has a law enforcement purpose *at the time the agency receives a FOIA request*. . . ." 703 F. Supp. at 1010 (emphasis added).

In this case, as is evident from the Statement of Facts, the DCAA had continuous possession of the documents for eight years when it denied the FOIA request. Obviously, the documents had not been "compiled" by the FBI for any purpose in any sense at any point during that long interval. All that can be said is that the FBI did not want the documents disclosed to the Corporation and that to thwart any such disclosure, it first directed the DCAA to withhold the documents and, after DCAA's decision not to release the documents, seized them. In an effort thereafter to provide some semblance of a law enforcement purpose to these actions in clear defiance of the law, the Government trumpeted the fact that the documents had been presented to a grand jury and attempted to invoke the strictures in Fed. R. Crim. P. 6(e) against their disclosure. No serious legal issue as to the scope of Exemption 7 is raised by such investigative tactics.

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[11] *See, e.g., Birch v. United States Postal Service*, 803 F.2d 1206, 1209 (D.C. Cir. 1986); *Goldschmidt v. United States Dep't. of Agriculture*, 557 F. Supp. 274, 276 (D.D.C. 1983); *Hatcher v. United States Postal Service*, 556 F. Supp. 331 (D.D.C. 1982).

II. THE GOVERNMENT'S CONSTRUCTION OF EXEMPTION 7 NEGATES THE ACT'S THRESHOLD REQUIREMENT THAT ANY WITHHELD RECORDS MUST HAVE BEEN COMPILED FOR LAW ENFORCEMENT PURPOSES

INTRODUCTION

The Government's success in promoting this case into a test of whether Exemption 7's threshold requirement can be met by a recompilation for law enforcement purposes of otherwise non-exempt documents virtually assures that any disclosures in response to the Corporation's September 30, 1986 FOIA request will be delayed until the disclosures become useless. Obviously, such delay defeats an important objective of the FOIA by allowing information to be withheld until its release serves no purpose. The extreme interpretation of Exemption 7 pressed by the Government, if approved by the Court, would guaranty the same result in almost any case in which a prosecutor is determined to thwart access to such information.

The thrust of the Government's argument is that any agency records which the FBI or other law enforcement agency prefers to withhold become records "compiled" for law enforcement purposes whenever they are removed or taken into custody by such agencies. Release of the records then must be tested by one of the six specific policies justifying non-disclosure set forth in subdivisions (A)-(F) of Exemption 7. The term "compiled" in the threshold criterion for exemption would be converted into a term of art broad enough to include any process by which records are obtained by a law enforcement agency. This would allow the threshold criterion for withholding to be satisfied whenever records are located in a law enforcement file so that the inquiry in every Exemption 7 case would focus immediately on the specific criteria in subdivisions (A)-(F) justifying exemption from mandatory disclosure.

Apart from its lack of any basis in the language of Exemption 7, this construction would assure the same kind of delay in every FOIA case involving documents in the custody of a law enforcement agency as has occurred in this case. Regardless of where the

documents are located at the time of the FOIA request, or for how long they have been there, or the purpose for which or circumstances under which they were created, upon their transfer or seizure by a law enforcement agency access could be denied until the FOIA requester convinced the law enforcement agency that disclosure of the documents would not offend any of the specific criteria for non-disclosure. Since, in the typical case, all detailed information regarding the contents of the documents would be unknown to the requester, denial of release could be justified as a matter of course. In any subsequent lawsuit the burden of proof would shift, but, as this case demonstrates, the government could attempt to withhold any information about the documents, such as a *Vaughn* index, and make it impossible to develop a factual record without further extended proceedings. Ultimately, no document in a law enforcement file ever would be released before it was too late to serve any purpose to the party seeking the records.

The 1974 amendments to Exemption 7 reflected Congress' concern with administrative agencies that were being "dilatory in complying with the spirit of the Act. . . ." *NLRB v. Robbins Tire and Rubber Co.*, 437 U.S. 214, 226-227 (1978). The Corporation's 30-month quest for the disclosure of the eight-year old DCAA records at issue here could serve as a case history of the reasons for such concern. None of the Government's arguments regarding Exemption 7 requires or justifies a ruling by the Court in this case which would allow this pattern to repeat itself in all such future cases.

A. The Government's Construction Of Exemption 7 Is Not Consistent With Its Plain Meaning

The Government's argument that the court of appeals, in effect, has inserted the word "originally" into the phrase "records or information compiled for law enforcement purposes" and thus ignored the "plain meaning" of the statute is disingenuous. The FOIA does not use the phrase "originally compiled" and neither does the court of appeals' opinion.

The phrase "originally compiled" does appear, however, in this Court's opinion in *Federal Bureau of Investigation v. Abram-*

son, 456 U.S. 615 (1982). In *Abramson*, the Court faced "[t]he sole question . . . whether information *originally* compiled for law enforcement purposes loses its Exemption 7 protection if summarized in a new document not created for law enforcement purposes." 456 U.S. at 623 (emphasis added). The Court held that "information initially contained in a record made for law enforcement purposes continues to meet the threshhold requirements of Exemption 7 where that recorded information is reproduced or summarized in a new document prepared for a non-law-enforcement purpose." *Id.* at 631-632. The converse of this proposition clearly is that information "originally compiled" for a "non-law-enforcement purpose" does not become exempt under Exemption 7 because it is recompiled at some future date for law enforcement purposes. Under *Abramson*, therefore, the documents compiled by DCAA for non-law-enforcement purposes could not have been withheld under Exemption 7 even if, contrary to the facts, they had subsequently been recompiled by the FBI for law enforcement purposes.

Ironically, it was the Government which successfully argued in *Abramson* that Exemption 7 authorized the withholding of information which "originated" in a law enforcement record, 456 U.S. at 632, but which now vehemently complains that the court of appeals added these words to the plain meaning of the statute.[12] In fact, the Government is still at it. Now it wants to add both "originally" compiled (although for the opposite purpose) and "subsequently" or "later" recompiled to the unadorned language enacted by Congress. In the Government's latest interpretation of Exemption 7, documents could be withheld that are "*originally* compiled for non-law-enforcement purposes, but *later* compiled for law enforcement purposes." Pet. Br. 13 (emphasis added). Obviously, if this is what Congress intended, Congress easily could

[12] In its brief on the merits in *Abramson*, the Government argued that in determining whether a document has been compiled for law enforcement purposes, "the circumstances of the original collection — or compilation — of the information by the agency is surely of greater significance than the circumstances of its transfer into another piece of paper to be used within the government for some non-law-enforcement purpose." Brief for Petitioners at 21-22, *FBI v. Abramson*, 456 U.S. 615 (1982) (No. 80-1735).

have said so. It chose instead to say, without qualification, that documents could be withheld only if they were "compiled for law enforcement purposes."

B. The Term "Compiled" Does Not Have The All-Encompassing Scope Ascribed To It By The Government

The Government's contention that the court of appeals erred in giving "compiled" an "unduly narrow and artificial meaning" rather than its "ordinary" meaning, Pet. Br. 17, is pure cant. It is the Government affidavit which says that the documents in this case were "compiled by the DCAA," not just the court of appeals. If the Government is contending that the FBI's seizure of the file folders containing these documents from the DCAA is a "recompilation" of the documents, it is the Government, not the court of appeals, which is depriving the word "compiled" of its ordinary meaning.

The quarrel here is not with the definition of the word "compile" in *Webster's Ninth New Collegiate Dictionary* (1988):

> 1: to collect and edit into a volume 2: to compose out of materials from other documents 3: to run (as a program) through a compiler 4: to build up gradually.

Pet. Br. 17. The quarrel is with the Government's attempt to fit into this definition what happened in this case.

Clearly under *Webster's* definition, to "compile" is not the same as to seize, to transfer, to take custody of, to remove, or to commingle. None of the definitions of these words includes "compile" and the definition of "compile" includes none of the other words. One who "compiles" a document must do more than merely collect, obtain or receive a document from another source. As defined by *Webster's*, a document is compiled if it has been "collect[ed] and edit[ed] into a volume" or "compose[d] out of materials from other documents." Merely moving documents from one location to another is not "compiling" them as that word is defined in *Webster's* or in ordinary usage.

We agree that "the famous collection of correspondence published" as the *Holmes-Laski Letters* (M. Howe ed. 1953) is an excellent example of a compilation of documents. Pet. Br. 19. These letters were generated or created by Justice Holmes and Mr. Laski between 1916-1935. The letters were later "collected" by Howe *and* "edited into a volume." The same is true of the hypothetical case of creating a treatise on constitutional law from relevant opinions of this Court.[13] These examples do not support the Government's argument; they destroy it by revealing the striking difference between the process of compiling selected letters or relevant court opinions for publication as literature or teaching materials and a mere change in the custody of an intact collection of documents.

Since the Government's brief leaves a false impression, it again must be stressed that the Corporation knows of no evidence in this case and there is no finding by either the district court or the court of appeals that the FBI did anything with the DCAA documents other than remove them from the DCAA. It must be emphasized also that the Corporation has never sought any FBI digests, summaries, analyses, or other edited versions of the documents, if such exist. The Corporation's request was for the documents compiled by the DCAA and those documents, as the Statement of Facts indicates, appear to have been removed intact by the FBI from the DCAA. Such removal, as the court of appeals held, could not possibly affect the Corporation's right to disclosure of the DCAA documents.

C. The Use Of "Compiled" In Its Past Tense In Exemption 7 Makes Irrelevant Any Future Recompilation For Law Enforcement Purposes

The Government's brief also ignores the fact that Exemption 7 uses the term "compiled," the past tense of the verb "to compile."

[13] The Court's recent decision in *United States Department of Justice v. Reporters Committee for Freedom of the Press*, ___U.S___, 109 S.Ct. 1468 (1989), provides another example of documents compiled for law-enforcement purposes. Neither party in that case disputed the fact that the computerized rap-sheet information at issue was compiled by the FBI for law-enforcement purposes. Moreover, the FOIA request at issue in *Reporters Committee* explicitly sought the FBI compilation, not the underlying source materials.

Clearly this contemplates that whatever compilation is involved has already occurred. "Compiled" obviously is not the term which would be used to describe an ongoing or future compilation.

This interpretation of Exemption 7 is confirmed by comparing Exemption 7 and Exemption 1 relating to the disclosure of classified information. Exemption 1 applies to matters that are "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy . . . ." The referenced Executive Order, Executive Order 12356, § 1.6(d), 3 C.F.R. 166 (1983), provides expressly that information may be "classified or reclassified" after an agency has received a request for it under the FOIA. As explained in *Goldberg v. United States Dep't of State*, 818 F.2d 71, 77 (D.C. Cir. 1987), *cert. denied*, ___ U.S.___, 108 S.Ct. 1075 (1988), this language "explicitly allows agencies to make classification and reclassification decisions in light of, and at the time of, FOIA requests."

Exemption 7 contains no comparable language or reference. It says "compiled," not "compiled or recompiled," or "originally compiled and later recompiled." In short, any reasonable interpretation in accord with its plain meaning would exclude any such recompilations even if, contrary to the facts in this case, the DCAA documents had been recompiled by the FBI and such recompilations had been requested by the Corporation.

D. The Language And Structure Of Exemption 7 Give Primacy To Its Threshold Requirement That The Records Have Been "Compiled For Law Enforcement Purposes"

By giving the term "compiled" a virtually all encompassing scope, the Government would focus every Exemption 7 case on whether disclosure would trigger one of the concerns set forth in subdivisions (A)-(F), rather than on the threshold question of whether the documents were compiled for law enforcement purposes. There is nothing, however, in the language and structure of Exemption 7 which suggests that the threshold test for non-disclosure was intended in practice to be reduced to an inconsequential preliminary. The structure of the section suggests the opposite

conclusion by giving primacy to the threshold requirement and eliminating any need to consider the specific grounds for non-disclosure in subdivisions (A)-(F) unless the threshold requirement is first satisfied.[14]

Moreover, Exemption 7 clearly allows generic determinations as to whether records "have been compiled for law enforcement purposes." In *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), this Court rejected an argument that Exemption 7(A) required an "individual, case-by-case" determination of whether disclosure of witness statements would interfere with NLRB enforcement proceedings. *Robbins*, 437 U.S. at 222, 236. In his opinion for the Court, Justice Marshall explained that subdivision (A) of Exemption 7 ("interfere with enforcement proceedings"), unlike subdivisions (B) (C) and (D), did not "seem to require a showing that the factors made relevant by the statute are present in each distinct situation." *Id.* at 223. "[S]ince subdivision (A) speaks in the plural voice about 'enforcement proceedings,' it appears to contemplate that certain generic determinations might be made." *Id.* at 223-224.

Exactly the same point may be made in regard to the introductory language of Exemption 7 ("records. . . compiled for law enforcement purposes"). This language also speaks in the "plural voice" about "law enforcement purposes" and "appears to contemplate that certain generic determinations might be made." There are no references in the introductory language, as in subdivisions (B), (C), and (D), to "a person," "an unwarranted invasion," or "a confidential source," which might "seem to require a showing that the factors made relevant by the statute are present in each distinct situation." *Id.* at 223.

It is clear from this analysis that Congress did not intend to force every Exemption 7 case into wrangling over whether the release of specific documents would cause one of the dangers in subdivisions (A)-(F). A Congress concerned that federal agencies were being "dilatory in complying with the spirit of the Act,"

[14] In *FBI v. Abramson*, 456 U.S. 615 (1982), this Court recognized that if a document is not "compiled for law enforcement purposes," it is irrelevant whether its release would cause one of the harms enumerated in the statute. *Id.* at 622.

Robbins, 437 U.S. at 226-227, enacted a clear and generic threshold test for any withholding of documents.

E. The 1974 FOIA Amendments Made The Location Of Documents In An Investigative File Irrelevant

Prior to 1974, Exemption 7 protected from disclosure "matters that are . . . investigatory files compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7) (1970). Four decisions of the United States Court of Appeals for the District of Columbia Circuit broadly interpreted this language to exempt any materials found in an investigative file. *Robbins*, 437 U.S. at 228. These cases, in the view of Senator Hart, sponsor of the 1974 amendments, "erected a 'stone wall' against public access to any material in an investigatory file." *Id.* at 229 (citation omitted). One clear purpose of the 1974 amendments was to "rectify these erroneous judicial interpretations" by precluding the possibility of "impermissible 'commingling' by an agency's placing in an investigatory file material that did not legitimately have to be kept confidential." *Robbins*, 437 U.S. at 229-230. As explained in Judge Winter's opinion, "Congress substituted the word 'records' for 'files' to insure that documents produced in the routine course of Government operations would not be withheld under subsection (b)(7) merely because they had been commingled with investigative materials generated later in the course of a law enforcement proceeding." Pet. App. 8a.

The Government does not challenge this legislative history. Pet. Br. 25-26. It acknowledges that Senator Hart's amendment was intended "to respond specifically to and overrule" the D.C. Circuit decisions under which the only question in determining whether Exemption 7 applied "was whether the requested material was found in an investigatory file compiled for law enforcement purposes." *Id.* It correctly acknowledges that Senator Hart "feared that agencies would use that rule to commingle otherwise nonexempt materials with exempt materials in a law enforcement investigatory file and claim protection from disclosure for the whole file." *Id.*

What the Government refuses to acknowledge, however, is that this case presents exactly the situation against which the 1974 amendments were directed. As the court of appeals states in its opinion, "[t]he attempt in the instant case to withhold documents generated in the course of routine audits because they are now part of an investigatory file thus contravenes the obvious intent of the 1974 amendments to the FOIA." Pet. App. 8a. Based on the facts before the court of appeals, as discussed in detail in Argument I, *supra*, no other conclusion is possible.

F. The FOIA's Broad Disclosure Policies Are As Important In The Administration Of Justice As In Other Aspects Of Government Operations

Finally, Respondent must challenge the Government's invitation to the Court to accept the Government's interpretation of Exemption 7 in order to curb "meddling" in a grand jury proceeding. Pet. Br. 37.

Despite its lip service to the noble goals of the FOIA, the careful balance struck by Congress in various exemptions, and the need to enforce the Act in accordance with its plain meaning, this invitation discloses that at the heart of the Government's resistance to disclosure in this case is its hostility to any access by the Corporation to even the most routine government accounting records clearly relevant to its defense. The very idea that the Corporation should invoke the FOIA for this purpose is considered unworthy.

The Government should know better. The administration of justice is as important as any other function performed by government and the FOIA is as applicable to the work of the Department of Justice as to any other government agency. There is nothing the slightest bit untoward about any person under investigation seeking access to the full extent permitted by law to any information which may bear on his defense. The investigative tactics used to thwart DCAA's processing of the Corporation's FOIA request is what should be explained here, not the Corporation's quest for long forgotten accounting records buried in the DCAA's files

which may well show the Corporation's complete innocence, if a need for any such showing ever arises.

The Government should be chastened by its recent experience in the *General Dynamics* case[15] in which FOIA documents when finally released showed beyond peradventure of doubt the innocence of General Dynamics and James M. Beggs, a former NASA Administrator, of charges for which they were indicted. According to press reports[16] the Justice Department dropped the case when FOIA documents finally ordered released by the trial judge after frustrations similar to those encountered here, "blew a major hole in its theory of prosecution." "The government is standing up and saying, 'We were wrong,' Assistant Attorney General William F. Weld told a news conference." Washington Post, June 23, 1987, A1. Mr. Beggs, for his part, criticized the government's refusal to consider the facts before indictment and attributed the bringing of the indictment to the "strong political motivation to go after defense contractors these days." *Id.* A *Washington Post* editorial,[17] which noted that the dispute was about whether the billing of certain costs to the government was allowed under the terms of the contract, the same as the dispute here, said it was "hard to understand how this case was brought in the first place" and bemoaned the damage to innocent lives and the prosecutor's reputation.

Such fiascos strongly counsel against the Government's suggestion that this Court should adopt a strained and unwarranted interpretation of the FOIA to avoid "meddling" in law enforcement proceedings. This is not to suggest that the Corporation's need for the information is relevant to whether it may be withheld

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[15] *General Dynamics Corp. v. Dep't of the Army,* Civil Action No. CV-86-522-FFF (C.D. Cal. filed January 9, 1986); *General Dynamics Corp. v. Dep't. of the Army*, Cr. No. 85-1123-FFF (C.D. Cal. indictment dismissed June 22, 1987).

[16] Washington Post, June 23, 1987, A1; New York Times, June 23, 1987, A1. The Court may take judicial notice of matters of "public notoriety," *Tennessee Coal, Iron & Railroad Co. v. Muscoda*, 321 U.S. 590, 609 (1944), and the records of lower courts, *Boag v. MacDougall*, 454 U.S. 364, 367 (1982).

[17] Washington Post, June 24, 1987 (editorial).

under Exemption 7. The court of appeals properly noted that "the motive for an FOIA request is not relevant to whether the information must be disclosed" and that the "fact that the Corporation is under investigation does not alter . . . the requester's FOIA rights." Pet. App. 6a. We are content that the law be construed in accordance with its plain language, its objectives, and the facts in this case, without the suggested hostility towards the Corporation's purposes. It is evident from the opinion below that the court of appeals construed the law in precisely this manner and that its decision was correct.

CONCLUSION

The writ of certiorari should be dismissed as improvidently granted or, alternatively, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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REPLY

BRIEF

(8)

No. 88-1083

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In the Supreme Court of the United States

OCTOBER TERM, 1988

JOHN DOE AGENCY AND JOHN DOE GOVERNMENT AGENCY, PETITIONERS

v.

JOHN DOE CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Despite respondent's attempt (*e.g.*, Br. 3) to convert this case into a factual dispute, the essential facts in this case are undisputed. It was accepted by both the district court and the court of appeals that the records at issue in this case were originally obtained during the course of a routine audit, but were later turned over to John Doe Government Agency[1] for use in a grand jury investigation of a possible violation of the criminal law. The district

[1] We continue to refer to the government parties by their pseudonyms solely because of the sealing order entered by the court of appeals. See Pet. Br. II. We take no position on the appropriateness of that order, which was requested by respondent and not the government. Cf. Pub. Cit. Br. 12-15.

court upheld the government's claim of Exemption 7[2] protection in its entirety because it found that "there is a substantial risk that disclosure of any of this material, the documents, the *Vaughn* index, and the answers to [John Doe Corporation's] interrogatories, would jeopardize the grand jury proceedings." Pet. App. 14a.

The court of appeals did not dispute that finding of the risk of disclosure, but concluded that it is legally irrelevant. The court of appeals reversed and remanded the case on the ground that Exemption 7's threshold requirement that records or information be "compiled for law enforcement purposes" could not be satisfied because the documents at issue here had been "generated * * * in the course of * * * routine monitoring." Pet. App. 7a. The facts that the records later gained "investigative significance," *id.* at 8a, and were turned over to John Doe Government Agency for use in a criminal investigation, and that their release could reasonably be expected to interfere with law enforcement proceedings, were of no moment to the court of appeals because the court believed that the threshold requirement of Exemption 7 that records or information be "compiled for law enforcement purposes" was irrevocably defeated when the government initially obtained the documents for non-law-enforcement purposes.

As we showed in our opening brief, the court of appeals was legally incorrect in that view of the threshold requirement of Exemption 7. The plain words of the exemption, its legislative history, and its purpose all compel the conclusion that documents that the government originally obtained for non-law-enforcement purposes, but that later become part of a law enforcement investigation, are "compiled for law enforcement purposes" within the meaning of Exemption 7.

[2] Exemption 7 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(7) (Supp. V 1987).

1. Respondent does not squarely defend the court of appeals' ruling that the documents could not be "compiled for law enforcement purposes" because they were originally obtained for non-law-enforcement purposes.[3] Instead, respondent relies primarily on its contention (see, *e.g.*, Br. 9, 14-15) that the documents at issue were never "recompiled" for law enforcement purposes because they were merely "transferred" to John Doe Government Agency. Apparently, respondent's view is that this transfer of the documents to John Doe Government Agency for use in a criminal investigation is not sufficient to constitute compilation of the documents.

Respondent appears to suggest (Br. 21-22) that to "compile" records or information John Doe Government Agency, when it received the documents at issue from John Doe

[3] Respondent's assertion (Br. 9) that "[t]his case * * * does not involve the issue * * * whether records originally compiled for a non-law-enforcement purpose may subsequently be recompiled for law enforcement purposes"—an argument that respondent has advanced in its unsuccessful efforts to persuade this Court to deny a stay and to deny certiorari—is simply untenable. The court of appeals explicitly ruled that "a governmental entity cannot withhold materials requested under the FOIA on the ground that materials that were not investigatory records when compiled have since acquired investigative significance." Pet. App. 7a-8a. Although we disagree with much of the amicus brief filed by Public Citizen and the Freedom of Information Clearinghouse, which focuses almost entirely on issues that are not before the Court, that brief does have the virtue of admitting (Br. 6) that "the court of appeals held that the litmus test under Exemption 7 is whether the records or information were compiled for a law enforcement purpose when they were created." See also Pub. Cit. Br. 8 n.6. It is that ruling of the court of appeals that the threshold "compiled for law enforcement purposes" requirement of Exemption 7 is determined at the time the records or information were created or originally obtained by the government, and that such compilation for law enforcement purposes cannot take place later, that this Court granted certiorari to review and should now reverse.

Agency, would have had to engage in some act that changed the substance of the documents, such as editing or composing them. See also Pub. Cit. Br. 8.[4] That view is wholly without merit. Obviously, many documents used in all sorts of law enforcement investigations are not composed or edited by the government. In the ordinary law enforcement investigation, documents will be compiled by gathering them together and using them, with or without change, as is appropriate in the investigation.

To refer to such gathering together as "compiling" the documents is not in the least unnatural. For example, the third definition of "compile" in *The Random House Dictionary of the English Language* 417 (2d ed. unabridged 1987) is "to gather together: *to compile data.*" That sense of the word "compile," and not a different sense appropriate to literary contexts, is the one that Congress is far and away most likely to have had in mind in drafting Exemption 7.[5] Thus, the lower courts have equated "compiled for

[4] Respondent's brief may also be read to suggest that, if John Doe Government Agency intermingled the John Doe Agency documents with one or more other documents, it "compiled" them, but that otherwise John Doe Government Agency did not "compile" the documents. Such an argument would trivialize the Exemption 7 threshold test. It is inconceivable that Congress intended to forbid interference with enforcement proceedings whenever the law enforcement agency itself puts two or more documents together, in the manner in which an editor "compiles" a volume of materials, but to permit such interference whenever the law enforcement agency obtains a group of documents intact from another source.

[5] The word "compiled" is *broad enough* to cover the literary analogies that we used in our opening brief (at 19), a fact that usefully demonstrates that the court of appeals completely misused the word as a synonym for originally obtained or generated, but it does not follow that *only* documents that are gathered together and edited into book form are "compiled." Congress used the word "compiled" in its natural sense as a synonym for "gathered," without adding senseless

law enforcement purposes" with "gathered" for law enforcement purposes, *Arenberg* v. *DEA*, 849 F.2d 579, 581 (11th Cir. 1988), and "amassed in connection with an enforcement proceeding," *Center for National Policy Review on Race & Urban Issues* v. *Weinberger*, 502 F.2d 370, 373 (D.C. Cir. 1973).[6] No court of appeals has ever adopted respondent's more restrictive reading of the word "compiled."

Respondent's argument also would have perverse consequences. Consider, for example, the FBI's files of criminal history information, which were at issue before this Court in *United States Department of Justice* v. *Reporters Committee for Freedom of the Press*, 109 S. Ct. 1468 (1989). Obviously, most of the records in those files qualify as having been "compiled for law enforcement purposes" under any test. Respondent's argument, however, would apparently require the Court to distinguish those criminal history records that came from multiple sources, and were edited into another form by the FBI, from original records that the FBI had received from a State and maintained intact. An individual whose arrest record came entirely from one State might be denied the protections of Exemption 7 because, under respondent's theory, his records might not have been "compiled" by the FBI, whereas the "rap sheet" of an individual whose multistate arrest records were combined by the FBI would receive the protection of Exemption 7(C), 5 U.S.C. 552(b)(7)(C) (Supp. V 1987), as construed in *Reporters Committee*. Even the latter individual might have his original, State-generated records disclosed if the FBI retained them, since respondent would maintain

additional requirements in order for records or information to be deemed "compiled."

[6] Although the 1974 amendments were intended to disapprove of a portion of that opinion, see Pet. Br. 25-29, the 1974 amendments did

that only the rap sheets themselves and not the underlying materials were "compiled" by the FBI.[7] Respondent's restrictive reading of the word "compiled" thus threatens to make an end run around *Reporters Committee* and to require indiscriminate release of law enforcement records on the basis of distinctions that would render the statutory policy incoherent.

Furthermore, contrary to the impression given by respondent (*e.g.*, Br. 22), John Doe Government Agency did more than just receive the documents at issue from John Doe Agency. The documents taken by John Doe Government Agency became part of a criminal investigation. "The documents at issue in [this case] had been removed from the custody of [John Doe Agency] by

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not alter the threshold phrase "compiled for law enforcement purposes." They were not intended to modify those cases, such as *Center for National Policy*, that "treated the phrase as a broad, descriptive classification, the use of which was largely determined by the agency in question." *Williams* v. *FBI*, 730 F.2d 882, 884 (2d Cir. 1984).

[7] The suggestion that FOIA requesters might try to make an end run around Exemption 7 by requesting the uncompiled versions of law enforcement records is not fanciful. That is precisely the suggestion of amici in the present case, who assert that John Doe Government Agency should have simply referred respondent's FOIA request to John Doe Agency. Pub. Cit. Br. 14. A comparable suggestion was advanced by the court of appeals in the *Reporters Committee* decision that this Court reversed. See *Reporters Committee for Freedom of the Press* v. *United States Department of Justice*, 816 F.2d 730, 743 (D.C. Cir. 1987) (suggesting that Department of Justice "refer[] appellants to the law enforcement agency that provided the information to the Department"), rev'd, 109 S. Ct. 1468 (1989). See also *Gould Inc.* v. *GSA*, 688 F. Supp. 689, 698 n.23 (D.D.C. 1988) ("In addition, of course, plaintiff may not circumvent the effect of Exemption 7 by seeking information in the investigatory file from other unprotected government sources. Merely because other copies exist in government files does not strip these documents—and the information they contain—of their exemption from disclosure.").

agents of [John Doe Government Agency] for the purpose of presenting these documents to the grand jury," and "[a]ll of the requested documents have been presented to the grand jury." J.A. 60-61. There was plainly more in this case than the "mere change in custody of an intact collection of documents." Resp. Br. 22. The documents were "compiled for law enforcement purposes."

2. Respondent also argues (Br. 15-17) that the documents at issue do not fall within Exemption 7 because the documents were not transferred from John Doe Agency to John Doe Government Agency until after respondent made its FOIA request for the documents. That argument, of course, has nothing to do with the rationale of the court below (and therefore may, but need not, be reached by this Court). The court of appeals did not even mention the timing of the document transfer, much less treat it as dispositive, in ruling that the documents did not satisfy the threshold requirement of Exemption 7. The court of appeals' decision is *not* limited to situations where the documents become part of a law enforcement investigation after the FOIA request is made. Rather, under the court of appeals' decision, disclosure is mandatory for all documents that were not *originally* compiled for law enforcement purposes. As we showed in our opening brief, that ruling is clearly wrong.[8]

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[8] It is also unprecedented among the courts of appeals. The claim of amici (Pub. Cit. Br. 6-7) that "a virtually unbroken string of precedents" supports that ruling is unfounded. In none of the cases that amici cite, other than district court cases, did a court reject a government claim of Exemption 7 on the ground that documents compiled for non-law-enforcement purposes could not later become records compiled for law enforcement purposes. And the better reasoned district court cases support the government's view, not that of the Second Circuit. See *Gould Inc.* v. *GSA*, 688 F. Supp. 689 (D.D.C. 1988); *Crowell & Moring* v. *Department of Defense*, 703 F.

Furthermore, if this Court reaches respondent's argument, the Court should reject it. The fact that the documents were transferred to John Doe Government Agency (and thus were compiled for law enforcement purposes) while respondent's FOIA request was pending, rather than earlier, does not justify the conclusion that the documents are outside the protection of Exemption 7. Congress recognized in enacting Exemption 7 that law enforcement agencies have legitimate needs to protect the confidentiality of certain documents in order to prevent interference with investigations and to avoid harming the government's case in court. See *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978). The protection of those interests depends on an assessment of the situation at the time the requested documents would be required to be released.[9]

Thus, it was perfectly proper for John Doe Agency, after receiving respondent's FOIA request, to check with law enforcement personnel to determine whether the documents were relevant to an ongoing criminal investigation and whether their release could reasonably be expected to interfere with that investigation. In this area of

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Supp. 1004 (D.D.C. 1989), appeal pending, No. 89-5066 (D.C. Cir.); *Raytheon Co.* v. *Department of the Navy*, Civ. No. 88-94 (D.D.C. Jan. 5, 1989); *Fedders Corp.* v. *FTC*, 494 F. Supp. 325 (S.D.N.Y.), aff'd mem., 646 F.2d 560 (2d Cir. 1980).

[9] For example, if documents come within the terms of Exemption 7(A), 5 U.S.C. 552(b)(7)(A) (Supp. V 1987), at the time of the FOIA request, but during the pendency of the request (or subsequent litigation) the law enforcement investigation terminates and it becomes clear that the release of the documents no longer would interfere with enforcement proceedings, there is no doubt that, because of those changed circumstances, Exemption 7(A) would cease to apply. By the same token, when the circumstances of an investigation develop during the pendency of a request (or subsequent litigation), the protections of Exemption 7(A) should commence to apply.

FOIA law, as in others, it is entirely appropriate for the government, after a FOIA request as well as before, to take steps to ensure that sensitive documents that Congress did not intend to subject to the disclosure requirements of FOIA are not disclosed.[10] The interests that Congress intended to protect through Exemption 7 should not be harmed solely because the FOIA requester asks the noninvestigative agency for particular records before the investigative agency does the same.

The key question in determining whether Exemption 7 applies is whether release of the requested documents will cause one of the harms against which the exemption provides protection. *FBI* v. *Abramson*, 456 U.S. 615, 627-628 (1982). That determination logically relates to the time when the documents would be required to be released. If, at that time, the documents are "compiled for law enforcement purposes" and their disclosure satisfies one of the criteria set forth in subsections (A)-(F), it does not matter whether the compilation occurred at the time that the

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[10] In an analogous situation, Exec. Order. No. 12,356 § 1.6(d), 3 C.F.R. 166, 170 (1983), specifically provides that information may be "classified or reclassified" after an agency has received a request for it under FOIA, and the courts have recognized that such classification brings documents within the protection of Exemption 1, 5 U.S.C. 552(b)(1) (1982 & Supp. V 1987). See generally *Goldberg* v. *Department of State*, 818 F.2d 71, 77 (D.C. Cir. 1987) (government may classify documents, and thus bring them within Exemption 1, after FOIA request has been received), cert. denied, 108 S. Ct. 1075 (1988); *Miller* v. *Department of State*, 779 F.2d 1378, 1388 (8th Cir. 1986) (same); *Baez* v. *Department of Justice*, 647 F.2d 1328, 1332-1333 (D.C. Cir. 1980) (same). Respondent has suggested nothing in the language, legislative history, or purpose of Exemption 7 that would preclude an agency from similarly compiling or recompiling information or records for legitimate law enforcement purposes after it has received a FOIA request.

government originally obtained the documents or at a later time.

The correctness of the foregoing analysis follows not only from fealty to the purposes of Congress in fashioning Exemption 7, but also from standard principles of equity. An action under FOIA is an action for an injunction: "The FOIA * * * explicitly confers jurisdiction to grant *injunctive relief of a described type,* namely, 'to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.' " *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 18 (1974) (footnote omitted and emphasis added) (quoting what is now 5 U.S.C. 552(a)(4)(B)). Unlike a proceeding for judicial review of administrative action, in which the court's inquiry is whether the agency acted correctly on the basis of the circumstances existing at the time the agency acted, an action for an injunction depends on the circumstances existing at the time the court rules. It is hornbook law that "it is the condition of things at the time of the hearing of the suit, rather than that existing at its commencement, which is material, and which furnishes the basis for relief." 42 Am. Jur. 2d *Injunctions* § 6, at 733 (1969).[11] Thus, the proper inquiry for a court in an Exemption 7 case is whether, *at the time of the court's decision,* the documents at issue have been "complied for law enforcement purposes." Whether the documents had been so compiled at the time the FOIA request was made, or at the time suit was brought, is irrelevant.[12]

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[11] The same source adds: "The court is not only authorized, but it is also its duty, to determine not merely whether the plaintiff was entitled to an injunction at the time he began his suit, but whether the facts as they appear at the time of the hearing warrant such relief * * *."

[12] In this case, of course, the documents *had been* compiled before suit was filed. Respondent can prevail only if this Court adopts

Thus, there is no inconsistency between our position and the supposed use of the past tense of the verb "to compile" in the statute (see Resp. Br. 22-23). Our position applies only to documents that were "compiled" before the relevant time, but we differ with respondent as to what that relevant time is.[13]

Naturally, we recognize the theoretical potential for abuse in a rule of law that allows the government to compile documents in order to bring them within a FOIA exemption that was not applicable at the time of the FOIA request. But courts have ample power to protect against any such abuses by enforcing the explicit statutory requirements that the compilation be "for law enforcement purposes" and that the criteria of one or more of subsections (A)-(F) be met; there is no need for a rule of law that requires disclosure of documents that *were* compiled for law enforcement purposes (after the FOIA request) and whose disclosure *would* in fact cause one of the specified

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respondent's argument in its extreme form, *i.e.*, that the relevant facts are frozen at the time of the FOIA request and no later.

[13] In any event, respondent is wrong as a matter of grammar in suggesting that the language of Exemption 7 "uses * * * the past tense of the verb 'to compile.' " Br. 22. In the statutory phrase "records or information compiled for law enforcement purposes" (5 U.S.C. 552(b)(7) (Supp. V 1987)), the word "compiled," which is the past or passive participle of "to compile," is used not as a verb form but as an adjective. See generally, *e.g.*, B. Evans & C. Evans, *A Dictionary of Contemporary American Usage* 353-354 (1957) (discussing use of participles as adjectives). The word "compiled" in the context of Exemption 7 no more "[c]learly" and "obviously" (Resp. Br. 23) connotes the past than does the word "inclined" in the phrase "those of us who are inclined to give wide latitude to the views of the voters' representatives on nonconstitutional matters" (*Rodriquez de Quijas* v. *Shearson/American Express, Inc.*, 109 S. Ct. 1917, 1923 (1989) (Stevens J., dissenting)).

harms that Congress sought to prevent. And there is no reason to fear abuse on the facts of this case.[14] There is not the slightest support in the record for the proposition that, rather than engaging in legitimate law enforcement activity, John Doe Government Agency took the documents at issue from John Doe Agency *for the purpose* of making an otherwise inapplicable FOIA exemption apply.

Rather, as is obvious from the subpoenas issued in February 1986 and thereafter, which are what prompted respondent's September 1986 FOIA request in the first place, the government long before September 1986 was engaged in a law enforcement investigation that focused on, among other things, respondent's 1978 correspondence with John Doe Agency.[15] John Doe Government Agency's request to John Doe Agency for the documents at issue here, and the subsequent transfer of documents in accordance with that request, were a natural and timely outgrowth of that investigation. Respondent had no right to obtain disclosures that "could reasonably be expected to

[14] The district court specifically found (and the court of appeals did not disagree) that disclosure could reasonably be expected to interfere with a law enforcement investigation. Such a finding could not be made if the government had simply commingled non-law-enforcement records with legitimate law enforcement files by the expedient of transferring the non-law-enforcement records to John Doe Government Agency. The established fact that all of the documents at issue have been presented to the grand jury (J.A. 61) also tends to demonstrate the bona fides of the government's law enforcement purpose in compiling the records at issue. Respondent has cited no evidence to support the proposition that there was improper commingling in this case.

[15] An investigation into possible fraudulent practices by John Doe Corporation was opened on July 18, 1985, and the grand jury issued its first subpoena to the Corporation on February 21, 1986. J.A. 91-92.

interfere with enforcement proceedings," 5 U.S.C. 552(b)(7)(A) (Supp. V 1987), just because its request for the records preceded rather than followed John Doe Government Agency's request to the same agency for the same documents as part of a legitimate law enforcement investigation.

3. Equally unpersuasive is respondent's argument (Br. 18) that our construction of Exemption 7 negates the threshold requirement of the exemption. Far from negating the "compiled for law enforcement purposes" threshold of Exemption 7, we simply ask that this Court construe that requirement to apply to records or information that the government has at some point gathered for law enforcement purposes, regardless of whether that gathering occurred when the government *originally* obtained the records or information.

Our disagreement with the court of appeals is not over whether the threshold requirement should be applied, but over whether the failure of the government to compile records or information for law enforcement purposes at the time the government originally obtained those records or that information irrevocably prevents the government from invoking Exemption 7 after the information or records are later recompiled for law enforcement purposes. Of course, most information or records in the possession of an agency whose primary duty is law enforcement will have been compiled by the agency for law enforcement purposes. Compare *Curran* v. *Department of Justice*, 813 F.2d 473, 475 (1st Cir. 1987), with *Pratt* v. *Webster*, 673 F.2d 408, 418 (D.C. Cir. 1982). But it is hardly the case that every document in the possession of such an agency will serve law enforcement purposes. Obvious examples of non-law-enforcement records kept by law enforcement agencies include personnel files, files used in negotiating with labor unions, and correspondence

with citizens that is unrelated to any particular law enforcement investigation. This case is not about whether such records will be inappropriately deemed law enforcement records; it is about whether classic law enforcement records—materials that have now been presented to a grand jury as part of an ongoing criminal investigation—will be inappropriately disclosed because of an artificial reading of the phrase "compiled for law enforcement purposes" that is contrary to the plain language of the statute and does not serve any discernible congressional purpose.

Respondent complains that the government's view of Exemption 7 will necessarily delay disclosure of documents and that under the government's interpretation of Exemption 7 it will be deprived of information relevant to its defense of possible criminal charges against it. Br. 18, 26-27. Those complaints are not justified. This case worked its way swiftly through the lower courts and would have been terminated with extraordinary speed if the Second Circuit had adopted the position that we urged below and have urged here. There is absolutely nothing about our position that bears any inherent relation to the speed with which a FOIA case will be resolved in the courts.

Respondent's protestations of innocence in the underlying criminal investigation are also a pointless distraction from the real issues before this Court. If respondent believes that the targets of grand jury investigations should have immediate discovery rights so as to prove their innocence, then respondent should urge Congress to change the rules of criminal discovery. But as things now stand, respondent has no right to discovery under the criminal rules, and the FOIA exemption on which we rely was intended to prevent FOIA from being used to allow litigants earlier or greater access to agency investigatory files than they would otherwise have. *NLRB* v. *Robbins*

Tire & Rubber Co., 437 U.S. 214, 224-225 (1978). We therefore make no apology for regarding as "unworthy" "[t]he very idea that the Corporation should invoke the FOIA for this purpose." Resp. Br. 26. Congress specifically regarded that use of FOIA to be unworthy and passed Exemption 7 precisely to protect against it. It is thus the very integrity of Congress's scheme that is at stake in this case.[16]

Like respondent, amici suggest (Pub. Cit. Br. 10-11) that the government's position in this case has far-reaching implications for the public availability of valuable information. The issue in this case, however, has nothing to do with the noble purposes for which FOIA was enacted. See Pet. Br. 37. All that is at issue here is whether documents that are transferred to a law enforcement agency in the course of a bona fide law enforcement investigation will be afforded the protections that Congress intended for such law enforcement records, or whether instead respondent will be permitted to use FOIA as the discovery device that Congress never intended.

Respondent's reliance (Br. 19-20) on *FBI* v. *Abramson*, 456 U.S. 615 (1982), is also strained and misguided. In *Abramson*, this Court held that a document once compiled for law enforcement purposes does not lose its Exemption 7 character when it is recompiled for other pur-

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[16] We agree entirely, of course, that "[t]here is nothing the slightest bit untoward about any person under investigation seeking access to the full extent permitted by law to any information which may bear on his defense." Resp. Br. 26. But if respondent is to prevail in this case it must be because the access respondent seeks is indeed "permitted by law," not because respondent wants to remake the law to make it possible for potential criminal defendants to obtain earlier discovery. See *id.* at 26-28. Respondent's argument in favor of broader criminal discovery flies in the face of the intention Congress has thus far expressed, which is all that is properly at issue before the Court.

poses. That conclusion followed both from the language of the statute ("compiled" as opposed to "compiled solely" or some other variant) and from the unmistakable, overriding objective of Congress to protect records that meet the criteria of subsections (A)-(F)—an objective that is no less at stake in this case. The conclusion did not follow from any judicial insertion of the word "originally" into the phrase "compiled for law enforcement purposes" as respondent suggests. There is no basis whatever for respondent's suggestion (Br. 20) that *Abramson* precludes the application of Exemption 7 to documents that are recompiled for law enforcement purposes after they were originally obtained for a non-law-enforcement purpose. This Court's focus in *Abramson* on the substance of Exemption 7 and its refusal to engage in a "formalistic" reading of that exemption that would defeat the purpose of the exemption are sharply at odds with respondent's position, not an aid to it. See *Binion* v. *United States Department of Justice*, 695 F.2d 1189, 1194 (9th Cir. 1983).

4. Finally, amici argue (Pub. Cit. Br. 10) that the implications of our position are that "the government could claim Exemption 7 protection simply by identifying a record as potentially relevant to a law enforcement investigation, even where the record has been compiled by the government as a matter of course, and even where it has previously been available to the public." But there is nothing wrong with information's becoming subject to Exemption 7, even though it previously would have been disclosable under FOIA. Exemption 7 was intended to protect against actual law enforcement harms. Those harms may not have been threatened at the time that the government originally compiled the information. But, if a law enforcement investigation later commences or the relevance of the information to a law enforcement investigation is later determined, and disclosure of the information would cause one of the harms listed in subsections (A)-(F) of Exemption 7, the information should be protected from disclosure by Exemption 7.

This Court's decisions teach that in construing Exemption 7 the courts should look carefully at the practical effect disclosure would have on the interests that the exemption seeks to protect. See *United States Department of Justice* v. *Reporters Committee for Freedom of the Press, supra*; *FBI* v. *Abramson, supra*; *NLRB* v. *Robbins Tire, supra*. The practical effect of disclosure is unaffected by whether the requested information was "compiled for law enforcement purposes" when the government originally obtained the information or was not so compiled until later. In ruling out the possibility that the requisite compilation can occur after the government initially obtains the records or information for non-law-enforcement purposes, the court of appeals committed clear error.[17]

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[17] Amici complain (Pub. Cit. Br. 15-16) of the district court's consideration of the *Vaughn* index in camera. Amici assert that the government offered to provide public *Vaughn* affidavits. This is incorrect. As we explained in our reply in support of our stay application to this Court and in our reply to respondent's opposition to the petition for a writ of certiorari, the government opposed the preparation of any *Vaughn* index on the ground that giving such a document to respondent would itself reveal information that respondent is seeking in this lawsuit, but that should instead remain secret. Because it took the broad position in resisting discovery, the government did not make the fallback suggestion that the *Vaughn* index be prepared, but be submitted in camera. The district court, however, ordered that procedure because of the government's legitimate concerns. The district court has more recently specifically found that disclosure of the *Vaughn* index "would jeopardize the grand jury proceeding" (Pet. App. 14a). Thus, there is no merit in amici's suggestion that the use of the in camera procedure in this case was unnecessary or improper.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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SUPPLEMENTAL BRIEF

FOR ARGUMENT

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No. 88-1083

IN THE

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OCTOBER TERM, 1988

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Petitioners,

v.

JOHN DOE CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENT

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SUPPLEMENTAL BRIEF FOR RESPONDENT

This Supplemental Brief is filed pursuant to Rule 35.5 of the Supreme Court Rules to call the Court's attention to late authorities not available in time to be included in Respondent's May 5, 1989 brief.

In *North v. Walsh*, C.A. No. 87-02700 (D.C. Cir. July 25, 1989) (to be reported at 881 F.2d 1088), the U. S. Court of Appeals for the D. C. Circuit held that documents could not be withheld under FOIA Exemption 7(A) on the basis that a subpoena for substantially the same materials had been rejected in parallel criminal proceedings.

The district court in granting summary judgment against North's FOIA claims had reasoned that "release of these records in advance of the time prescribed by the established rules of

criminal discovery or by court order would impair prospective law enforcement proceedings by distorting the criminal discovery mechanisms that have been designed to achieve a proper balance between the interests of the prosecution and those of the defense." *Id.*, slip op. at 10.

The court of appeals reversed, expressly rejecting the district court's reasoning. In an opinion for the court of appeals containing a thorough review of the precedents, Judge Ruth B. Ginsburg concludes that "[d]iscovery limitations, civil or criminal, . . . do not apply when FOIA requests are presented in a discrete civil action." *Id.*, slip op. at 16. As the opinion explains, "FOIA rights are unaffected by the requester's involvement in other litigation; an individual may therefore obtain under FOIA information that may be useful in non-FOIA litigation, even when the documents sought could not be obtained through discovery. . . . In this sense FOIA is itself a congressionally-approved resource open to every person, regardless of the requester's status as a criminal defendant." *Id.*, slip op. at 22.

The *North* decision supports Judge Winter's opinion for the court of appeals, which properly acknowledged that the FOIA may allow the disclosure of matters which could not be obtained in criminal discovery (Pet. App 8a),[1] and rejects one of the principal themes of the government's case (*See, e.g.*, Pet. Brief pp. 14, 15-16, 24, 37; Pet. Reply Brief p. 14, 15), in holding that Exemption 7

[1]Judge Winter's opinion states: "We realize that compliance with the FOIA may compel the government to disclose matters that are ordinarily beyond the scope of discovery in criminal investigations and thus may enable a potential defendant to prepare responses to the investigation and to construct a defense to criminal charges. That is a concern that should be addressed to Congress, however." (Pet. App. 8a.) In a footnote, the opinion in *North v. Walsh* points out that, following earlier decisions, the Justice Department had proposed an amendment "to prohibit use of the FOIA as a discovery device," a proposal which Congress has never adopted. *Id.*, slip op. at 17 n.8.

does not allow documents to be withheld in order to preclude a potential defendant from preparing responses to a criminal investigation.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* PUBLIC CITIZEN AND THE FREEDOM OF INFORMATION CLEARINGHOUSE

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BRIEF OF *AMICI CURIAE* PUBLIC CITIZEN AND THE FREEDOM OF INFORMATION CLEARINGHOUSE

INTEREST OF *AMICI CURIAE*

Amici Public Citizen and the Freedom of Information Clearinghouse are non-profit, public interest organizations that promote access to government information. In addition to educating the public on issues involving access to government information, the *amici* also conduct litigation under the Freedom of Information Act ("FOIA" and "Act"), 5 U.S.C. § 552 (1982 & Supp. V. 1987), and other laws designed to open government. Having instructed thousands of persons on how to use the FOIA and having litigated many FOIA cases, including *Department of Justice v. Julian*, 486 U.S. ____, 108 S. Ct. 1606 (1988); *CIA v. Sims*, 471 U.S. 159 (1985); *GTE Sylvania, Inc. v. Consumers Union*, 445 U.S. 375 (1980); and

Administrator, FAA v. Robertson, 422 U.S. 255 (1975), *amici* have a vital interest in how this Court construes Exemption 7 of the Act, which applies to records and information "compiled for law enforcement purposes." *Amici* also have an interest in the procedures to be followed in litigating FOIA cases — particularly the sealing of court records and the use of *ex parte* submissions — because these devices impair our ability to conduct litigation in the traditional, adversarial manner.

Amici support the ruling of the court of appeals, which reversed the district court's judgment denying the respondent John Doe Corporation ("the Corporation") access to the requested records and remanded the case for further proceedings. Our perspective is nonetheless different from the Corporation's in two respects. First, while its interest is focused narrowly on securing access to these particular records, *amici* seek to vindicate the broader interest at stake, namely to ensure that the public will continue to have access to valuable records and information routinely collected by numerous federal agencies concerning public health, safety, ethics, and other issues. Adopting the argument made by the government would jeopardize public access to such records. For that reason, in Part I of this brief, we focus on the key flaws in the government's analysis of Exemption 7.

Second, *amici* seek to ensure that FOIA litigation continues to occur in public and on the public record to the maximum extent possible. This particular lawsuit, however, has been shrouded in layers of secrecy, in part as a result of the Corporation's urging and acquiescence. In Part II of this brief, we address the serious procedural defects that have marred this action.[1]

[1]Counsel for the parties have consented to the filing of this brief. Their letters have been filed with the Clerk pursuant to Rule 36.2 of the Rules of this Court.

STATEMENT OF THE CASE

Amici will not repeat the facts as recited in the parties' briefs, but will highlight those aspects of this case that most clearly reveal the tiers of secrecy that enveloped this case soon after it began.

On June 1, 1987, the Corporation filed this FOIA action in its own name against the Defense Contracting Audit Agency ("DCAA") and the Federal Bureau of Investigation ("FBI").[2] J.A. 11. Neither the complaint nor the other early filings were placed under seal.

The Corporation then propounded interrogatories and moved to compel preparation of a *Vaughn* index so that it could obtain the evidence needed to present its case and refute the government's exemption claims.[3] J.A. 6, 55-59. The Corporation accordingly asked for such critical information as a full description of the records withheld and the date on which they had been transferred from the DCAA to the FBI. *Id.* at 57. Although the government indicated that it was willing to provide the Corporation with this information, it moved for a protective order asking the district court to allow it to delay filing a responsive affidavit until it moved for summary judgment. J.A. 71.

[2]*Amici* refer to the DCAA and the FBI by their correct titles, rather than as "John Doe Agency" and "John Doe Government Agency," respectively, because their identities are now a matter of public record. Respondent's Brief in Opposition to Petition for Certiorari at 4; Brief for Respondent at 1. *See infra* at 12.

[3]*See Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). A *Vaughn* index is an itemized index of all records responsive to the FOIA request, identifying the nature and subject matter of each record and justifying why it is being withheld. The *Vaughn* index is prepared by the government to permit the requester to mount an informed challenge to the government's claims that the withheld records are exempt.

In support of its motion for a protective order, the government filed a two-page declaration by an Assistant United States Attorney stating that the Corporation was the subject of a grand jury investigation. J.A. 60. Relying on that declaration, the Corporation asked the district court to seal the entire record in this case to protect its identity, which the district court did. J.A. 75-76.

Not only was the case thereby removed from public view, the district court then decided on its own motion to require the government to answer the requested discovery *ex parte*. J.A. 71. In so doing, the district court recognized that "[a]t this time it is impossible for the court, based on the record before it, to determine whether these files were merely routine auditing correspondence or whether their purpose was to determine if grounds existed for bringing an action against [Corporation]." J.A. 69. Instead of building a public evidentiary record, however, the district court rejected the government's offer to supply affidavits, stating that it "choose[s] to proceed differently" because it is "more expeditious" to do so. J.A. 71. Accordingly, the court ordered that the government submit *in camera* a *Vaughn* index and answers to the Corporation's interrogatories. *Id.* The district court recognized that without access to these discovery materials the Corporation would have no "opportunity to challenge the government's claim of exemptions under the FOIA." *Id.* On March 28, 1988, the district court concluded without elaboration that the agencies are not required to turn over either the discovery material or the responsive records to the Corporation because "there is a substantial risk that disclosure of any of this material . . . would jeopardize the grand jury proceeding." Pet. App. 14a.

The Corporation appealed, and the court of appeals perpetuated the secrecy in this case by agreeing to seal the entire record at the Corporation's request. J.A. 2. As to access

to the records, however, the court of appeals reversed the district court's judgment that records compiled for routine audits can be later withheld as records "compiled for law enforcement purposes" within the meaning of Exemption 7. Pet. App. 6a-8a, 11a. At the same time, the court of appeals vacated the district court's decision denying the Corporation access to the *Vaughn* index, and remanded the case for further proceedings on whether the Corporation should be given access to the interrogatory answers to assist it in litigating whether any other exemptions claimed by the government preclude disclosure of the records. Pet. App. 9a-11a.

After the ruling of the court of appeals, both parties recognized that these secrecy orders impaired their ability to present their legal arguments, as well as any court's ability to resolve them. In seeking a stay from the court of appeals, the government made critical factual disclosures to that court and to the Corporation. It revealed for the first time (1) that the grand jury was empaneled on March 23, 1987, six months after the Corporation made its FOIA request; (2) that the DCAA had possession of the responsive records when it received and denied the Corporation's FOIA request; and (3) that the DCAA transferred the responsive records to the FBI two days after it had denied the Corporation's request. J.A. 92. In a similar revealing vein, despite the sealing order of the court of appeals and this Court's use of pseudonyms for the parties, the Corporation used the real names of the agencies in its publicly filed opposition to the petition for certiorari and brief on the merits. Respondent's Brief in Opposition to Petition for Certiorari at 4; Brief of Respondent at 1.

ARGUMENT

I. THE INTERPRETATION OF THE TERM "COMPILED" URGED BY THE GOVERNMENT WOULD SIGNIFICANTLY UNDERMINE THE FOIA.

As amended in 1986, Exemption 7 shields from the FOIA's mandatory disclosure provisions "investigatory records or information *compiled for law enforcement purposes*, but only to the extent that the production of such law enforcement records or information" leads to one of the six harms enumerated in the exemption. 5 U.S.C. § 552(b)(7)(1982 & Supp. V 1987) (emphasis added).[4] Based on a straightforward interpretation of this language, the court of appeals held that the litmus test under Exemption 7 is whether the records or information were compiled for a law enforcement purpose when they were created. In so ruling, it followed a virtually unbroken string of precedents, spanning fifteen years. *See, e.g., Stern v. FBI*, 737 F.2d 84, 89-90 (D.C. Cir. 1984); *Church of Scientology v. Department of the Army*, 611 F.2d 738, 748 (9th Cir. 1979); *Sears, Roebuck & Co. v. GSA*, 509 F.2d 527, 530 (D.C. Cir. 1974), *modified on remand*, 402 F.Supp. 378 (D.D.C. 1975), *rev'd in part, aff'd in part, and remanded*, 553 F.2d 1378 (D.C. Cir.), *cert. denied*, 434 U.S. 826 (1977); *Rural Housing Alliance v. Department of Agriculture*, 498 F.2d 73, 81-82 (D.C. Cir. 1974); *Goldschmidt v. Department of Agriculture*, 557 F. Supp. 274, 277 (D.D.C. 1983); *Hatcher v. United States Postal Service*, 556 F. Supp. 331, 335 (D.D.C. 1982); *Gregory v. FDIC*, 470 F. Supp. 1329, 1334 (D.D.C. 1979), *rev'd on other grounds*, 631 F.2d 896 (D.C. Cir. 1980). *But see Gould, Inc. v. GSA*, 688 F. Supp. 689, 698 (D.D.C. 1988); *Crowell and Moring v. Department of Justice*, 703 F. Supp. 1004, 1009-10 (D.D.C. 1989).

[4]In pertinent part, Exemption 7 permits withholding of "records or information compiled for law enforcement purposes." The two harms asserted by the government in this case are that disclosure of the records or information "(A) could reasonably be expected to interfere with enforcement proceedings, . . . [or] (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(Supp. V 1987).

The government concedes that the DCAA records at issue here were not initially compiled for law enforcement purposes. To the contrary, they were assembled during the ordinary course of the government's monitoring of thousands of defense contractors. Nor does the government dispute that these records, as a general rule, are readily available under the FOIA. Had the Company filed its request for these records before any law enforcement investigation was initiated, there is no doubt that they would have been released.

What is different about this case, the government argues, is that in 1985 it decided to launch a criminal investigation into the Corporation's practices under its defense contracts. At that point, according to the government, any record or information in the government's possession — regardless of how innocuous or how long it has been available for public inspection — can then be "compiled" for law enforcement purposes merely by virtue of the fact that a law enforcement agency requests the record or information for possible use in an enforcement investigation.

To support this construction of Exemption 7, the government asks this Court to read Exemption 7's threshold requirement — that the record or information must be compiled for law enforcement purposes — out of the statute altogether. The government argues that the 1978 audit records at issue here were "compiled for law enforcement purposes" at the moment in 1986 — eight years after they were made — when

the FBI asked for them.[5] The government deliberately obscures exactly what it compiled in 1986. Compiled means "collect[ed] from different sources and put into a new form." Webster's New Universal Unabridged Dictionary (1983). Although the FBI acquired these requested records for its investigatory file, that act of acquisition does not mean that the audits and other responsive records themselves — previously compiled — were thereby compiled for law enforcement purposes.[6]

By focusing on the act of acquiring existing records for an investigatory file, instead of the time and purpose for which each record was compiled, the government invokes the discredited construction of Exemption 7 that led Congress to amend that provision in 1974. As originally enacted in 1966, Exemption 7 applied to "investigatory files." 5 U.S.C. § 552(b)(7) (1970). In a series of decisions, the D.C. Circuit afforded a per se exemption to all files that were found to be investigatory

[5]Because the FBI apparently did not ask for the records until *after* the Corporation's FOIA request, under the government's own analysis, the records must be disclosed since at the time of the request they were undeniably compiled for routine purposes.

[6]The principle on which *amici* rely — that the threshold inquiry under Exemption 7 must be whether the record was initially compiled for law enforcement purposes — is in keeping with well-settled doctrine in analogous areas of the law. Thus, for instance, it is clear that a non-privileged document cannot be transformed into one protected by the attorney-client privilege simply by having the client turn it over to his lawyer. *Fisher v. United States*, 425 U.S. 391, 403-04 (1976).

Similarly, Rule 6(e) of the Federal Rules of Criminal Procedure does not protect all materials presented to a grand jury, but only those records whose disclosure would reveal some aspect of the grand jury's investigation. *See, e.g., Senate of the Commonwealth of Puerto Rico v. Department of Justice*, 823 F.2d 574, 582-84 (D.C. Cir. 1987); *SEC v. Dresser Industries, Inc.*,628 F.2d 1368, 1382 (D.C. Cir.) (*en banc*), *cert. denied*, 449 U.S. 993 (1980); *United States v. Interstate Dress Carriers*, 280 F.2d 52, 54 (2d Cir. 1960).

in nature, even if the underlying investigation had long been closed. *Weisberg v. Department of Justice*, 489 F.2d 1195 (D.C. Cir. 1973) *(en banc), cert. denied*, 416 U.S. 993 (1974); *Center for National Policy Review on Race and Urban Issues v. Weinberger*, 502 F.2d 370 (D.C. Cir. 1974); *Ditlow v. Brinegar*, 494 F.2d 1073 (D.C. Cir.), *cert. denied*, 419 U.S. 974 (1974); *Aspin v. Department of Defense*, 491 F.2d 24 (D.C. Cir. 1973). No individualized review of particular records within the files was required; all materials in investigatory files were *ipso facto* exempt.

Congress acted swiftly to repudiate that interpretation of Exemption 7. It replaced the term "files" with "records," thereby changing "investigatory files compiled for law enforcement purposes" (5 U.S.C. § 552(b)(7)(1970) to "investigatory records compiled for law enforcement purposes" (5 U.S.C. § 552(b)(7)(1982).[7] The purpose of this amendment was to override the sweeping holdings of the D.C. Circuit and to ensure that only records that were actually prepared for law enforcement purposes could be withheld, and then only in those instances where their disclosure would cause an identifiable harm to the government's interests. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 227-36 (1978).

Since Congress amended the FOIA in 1974, this Court has interpreted the converse of the issue presented here, namely whether records compiled for law enforcement purposes must later be disclosed because they are subsequently compiled for a non-law enforcement purpose. In *FBI v. Abramson*, this Court held that Exemption 7 applies to records prepared for law enforcement purposes and, therefore, a record

[7]In turn, this phrase was modified in 1986 to add the words "and information" after records. 5 U.S.C. §552(b)(7) (Supp. V 1987). This change was not intended to alter the threshold requirement of Exemption 7. *See King v. Department of Justice*, 830 F.2d 210, 229 n.141 (D.C. Cir. 1987).

does not lose its integrity as a law enforcement record when later put to a different use. 456 U.S. 615, 624-25 (1982). What the government is asking the Court to do here is to apply a different definition of "compiled" to routine records so that they can become law enforcement records and, thus, be withheld under *Abramson*. This way, records created for law enforcement purposes are always exempt from disclosure, and once a record prepared for non-law enforcement purposes is acquired for use in law enforcement, it too can also be forever withheld, providing in both instances that the disclosures would cause an enumerated harm.

Although the government does not come to grips with the implications of its argument, they are far-reaching. Under its theory, the government could claim Exemption 7 protection simply by identifying a record as potentially relevant to a law enforcement investigation, even where the record has been compiled by the government as a matter of course, and even where it has previously been available to the public. If adopted, this construction could cut off access to a wide range of records.

For instance, in *Goldschmidt v. Department of Agriculture*, 557 F. Supp. at 276, the court ruled that meat inspection reports compiled by the Department of Agriculture were not covered by Exemption 7, even though they could alert the Department to violations of the law and, presumably, be used in enforcement proceedings. Similar reports are compiled by the Food and Drug Administration, the Occupational Safety and Health Administration, Consumer Product Safety Commission and other agencies entrusted with the mission of protecting public safety and health. Obviously, reports of this sort are of compelling interest to the public and they are generally available to the public under FOIA. However, under the government's theory, as soon as a law enforcement agency

decides to acquire the records in connection with an investigation, they are then automatically transformed into records "compiled for law enforcement purposes" and thereby made unavailable to the public.

The same would be true of the civil rights reports that a number of federal agencies compile. These reports are used to monitor whether federal contractors are complying with the civil rights laws. *See Sears, Roebuck Co. v. GSA*, 553 F.2d 1378 (D.C. Cir. 1987); *National Organization for Women v. Social Security Administration*, 736 F.2d 727 (D.C. Cir. 1984). Once again, while Exemption 7 is normally not a bar to disclosure of these reports, it could become a bar if the government's theory prevails. Such a result could put off limits records such as these, which are vitally important to those interested in determining whether federal contractors are complying with the equal employment opportunity requirements, whenever the government is contemplating an enforcement action.

Since the government concedes that the documents compiled by agencies during their normal monitoring activities are not generally covered by Exemption 7, it is asking this Court to hold that they are somehow transformed into law enforcement records within Exemption 7 when a law enforcement agency takes an interest in them. The government's construction of the term "compiled" is counter to the plain meaning of the statute, its legislative history, and this Court's previous interpretation of the term "compiled" in Exemption 7, and it would lead to absurd results.

II. THE PROCEDURES EMPLOYED IN THIS CASE THREATEN THE OPENNESS OF FOIA PROCEEDINGS AND JEOPARDIZE THE ABILITY OF FOIA PLAINTIFFS TO PARTICIPATE IN THE ADVERSARIAL PROCESS.

While the *amici* fully support the court of appeals' ruling on the merits, we take issue with two aspects of the procedures employed by the courts below in handling this litigation. First, the lower courts sealed the entire court record without a showing that such an extreme action was warranted. Second, the district court's *ex parte* review of the evidence submitted by the government short-circuited the adversarial process. We will address each procedural defect in turn.

1. To begin with, there is no basis in the Federal Rules of Civil or Appellate Procedure for the wholesale sealing orders entered by the lower courts. While courts have discretion to enter sealing orders, that discretion is not unbounded. Historically, judicial proceedings in this country have been open to the public, and a compelling showing must be made before a court may seal any portion of a court record. *See Richmond Newspapers, Inc. v. Commonwealth of Virginia*, 448 U.S. 555, 580 n.17 (1980); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1178-89, *reh'g denied*, 717 F.2d 963 (6th Cir. 1983); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). In this case, however, everything that has been submitted in this proceeding — all of the briefs, interrogatories, motions, and discovery materials — has been sealed and kept from public view in the lower courts. Only during the short period before the district court sealed the record and now in this Court have any facts about this case been made public.

The overbroad sealing orders in this case violate the presumption of openness that attaches to court records. *Nixon v. Warner Communications*, 435 U.S. at 597-98. Indeed,

the parties have recognized that the breadth of the sealing orders impairs litigation of this case. Here, despite the orders issued by both lower courts, the Corporation has found it necessary to reveal the identities of the petitioner agencies.

The names of agencies taken to court for withholding information from the public should be a matter of public record. In the same spirit that agencies are held accountable to the public through the release of information under the FOIA, they should also be held accountable to the public for how they process FOIA requests. Moreover, the result reached in a FOIA case can, in some cases, depend on which agency is involved since some exemptions depend on how the records were generated and used. In this case, the agencies' identities bear directly on the key legal issue since the agencies' FOIA regulations, which are not referred to by either party in the briefs before this Court, actually undercut the government's strained construction of the word "compiled."

All of the examples of records or information falling within Exemption 7 in the Department of Defense FOIA regulations, which apply to the DCAA, concern records or information prepared for law enforcement purposes. 32 C.F.R. § 286.13(a)(7)(ii)(1988). The regulations are directed at records or information "developed during the course of the investigation . . . or prepared in connection with related government litigation or adjudicative proceedings," or which would reveal that a firm or individual is being investigated or would contain "information obtained in confidence, express or implied, in the course of a criminal investigation." *Id.* Contrary to the government's position, the Department of Defense regulations suggest that Exemption 7 does not cover documents that predate a law enforcement investigation.

Similarly, according to the Department of Justice regulations, which apply to the FBI, a Department of Justice component

is to refer requests for information related to a law enforcement investigation to the component or agency that "generated or originated" that information. 28 C.F.R. § 16.4(d) (1988).[8] The FBI therefore should have referred the Corporation's FOIA request to the DCAA inasmuch as the records sought by the Corporation were not "generated or originated" by the FBI, but by the DCAA. One purpose of this regulation is to enable the FBI to avoid revealing any information about its law enforcement investigation, while ensuring the public access to non-investigatory records. Had this procedure been followed here, the FBI would not have injected itself into the DCAA's FOIA process, nor would it have answered the Corporation's FOIA request as it did. Rather it would have simply forwarded the request to the DCAA for a response.

The FBI has attempted an end-run around its own regulations in this case. Instead of permitting the Corporation's FOIA request to proceed as a request for DCAA records compiled for routine purposes, the FBI intervened to assert an exemption that the DCAA otherwise would not have claimed. In addition, the FBI apparently took physical possession of the only copies of the requested records so that, even if it had adhered to its regulations, the DCAA would no longer have anything to disclose to the Corporation.

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[8]The Department of Justice regulation provides:

> *Law enforcement information.*
> Whenever a request is made for a record containing information which relates to an investigation of a possible violation of criminal law or to a criminal law enforcement proceeding *and which was generated or originated by another component or agency*, the receiving component shall refer the responsibility for responding to the request to that other component or agency; however, such referral *shall extend only to the information generated or originated by that other component or agency.*

28 C.F.R. § 16.4(d)(1988) (emphasis added).

In sum, revelation of the names of the agencies helps place this case in its real context, where the Act and the applicable regulations can be seen to work as they are supposed to work. The *amici* urge this Court to refer to the agencies by name in the caption of this case and in the body of its decision. No purpose will be served by allowing those who read the briefs submitted to this Court to know the identities of the agencies while keeping that information from those who read only the Court's opinion.

2. Finally, there is another procedural matter that deserves mention. This case poses no national security concern, and the government offered to provide public *Vaughn* affidavits along with its motion for summary judgment. Yet, the district court, *sua sponte*, directed the government to file its responses to the Corporation's interrogatories and its *Vaughn* affidavit *ex parte*. The result, as the district court itself recognized, is that the Corporation was denied the opportunity to refute the evidence and to make legal arguments based on the facts of the case. This action is all the more disturbing given that the documents that the Court did see were the government's representations concerning the responsive records, not the records themselves.

This Court has recognized that *in camera* review of the underlying records should be limited to those few occasions where "the issue before the District Court could not otherwise be resolved." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. at 224; *accord EPA v. Mink*, 410 U.S. 73, 93 (1973). Here, however, the district court did not review the underlying records *in camera*. Rather, it directed that the government's *evidentiary submissions* be submitted *ex parte*, and based its ruling solely on these submissions. This, we submit, is far more troubling than *in camera* review of the actual records at issue.

Without access to the government's evidence, lawyers representing FOIA requesters are deprived of any opportunity to play an adversarial role in the proceeding. For this reason, the District of Columbia Circuit, as well as other courts of appeal, have permitted *in camera* inspection of evidentiary submissions only where "absolutely necessary." *Allen v. CIA*, 636 F.2d 1287, 1298 n.63 (D.C. Cir. 1980); *see, e.g., Lykins v. Department of Justice*, 725 F.2d 1455, 1465 (D.C. Cir. 1984); *Arieff v. Department of Navy*, 712 F.2d 1462, 1471 (D.C. Cir. 1983); *Yeager v. DEA*, 678 F.2d 315, 324 (D.C. Cir. 1982). Indeed, the D.C. Circuit has expressed "grave reservations regarding nonpublic presentations absent sensitive national security concerns." *Campbell v. Department of Health and Human Services*, 682 F.2d 256, 265 (D.C. Cir. 1982). Accordingly, if there is to be a remand in this case, we urge the Court to lay down strict standards to ensure that *in camera* evidentiary submissions are used, if at all, only as a last resort.

CONCLUSION

For the reasons stated above, the decision of the court of appeals should be affirmed. In addition, the FBI and the DCAA should appear in the caption of this case and be identified by name in the text of the Court's opinion. This Court should also instruct the district court to limit its sealing order to only those portions of the record necessary to protect compelling interests and to avoid *in camera* submissions unless there is no alternative.

Respectfully submitted,

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